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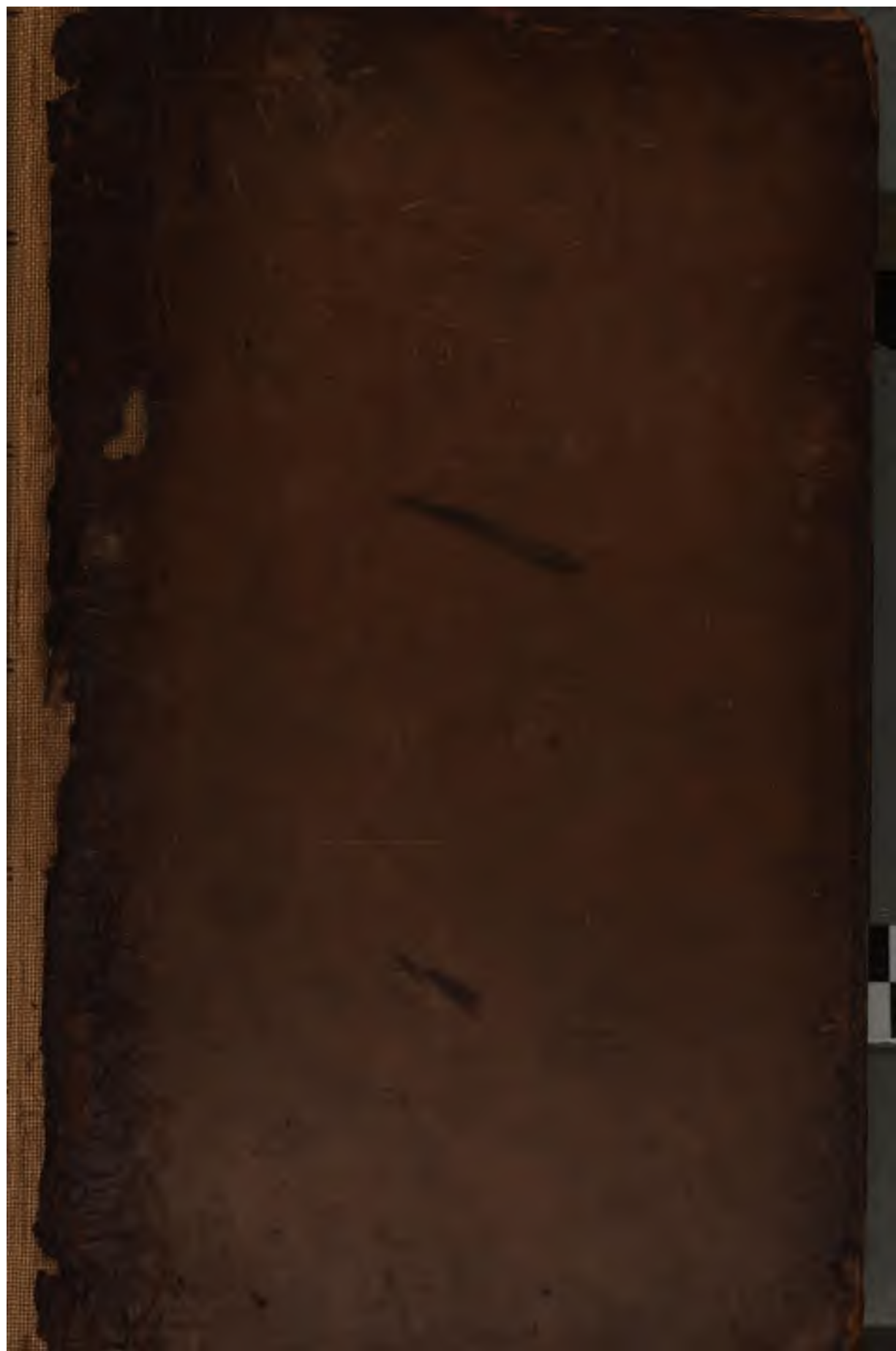
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CASES
IN
BANKRUPTCY;

BY
J. W. BUCK, Esq.

OF
THE MIDDLE TEMPLE, BARRISTER AT LAW.

VOL. I.

CONTAINING

Reports of Cases

DECIDED BY

LORD CHANCELLOR ELDON,

AND BY

**VICE CHANCELLORS SIR THOMAS PLUMER, AND
SIR JOHN LEACH.**

FROM

Michaelmas Term 1816, to Michaelmas Term 1820.

AND

A Digest

OF

*All the contemporary Cases relating to the Bankrupt Laws
decided in the other Courts.*

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THESE Cases are a continuation of the Work begun by Mr. ROSE. An alteration has been made in the plan which that gentleman originally adopted, by adding a digest of all the cases reported in the different courts, instead of an abridgment of each particular case. The increasing number of Reports has made this alteration necessary, in order that the work might be compressed within reasonable limits, and at the same time present, under one continued view, the contemporary decisions of the various courts.

No. 5, OLD SQUARE, LINCOLNS INN.

Michaelmas Term, 1820.

A

TABLE

OF

THE CASES REPORTED

IN THIS VOLUME.

	<i>Page</i>		<i>Page</i>
A.		Anon, ex parte, in the matter of	
ABBOTT, King v.	614	Salisbury	245
Abrahams, Ward v.	630	Anon, ex parte	475, 652, 675
Adams, in the matter of, ex parte		—, in the matter of, ex parte	
Whittington	87	Harrison	17
—, King v.	639	—, in the matter of, ex parte	
—, Noble v.	654	Treacher	17
Adamson, Nias v.	613	—, in the matter of, ex parte	
Aiken, ex parte	620	Ducane ..	18
Akhurst v. Jackson	608	—, in the matter of, ex parte	
Aldebert and Co. in the matter		Groome	39
of, ex parte Schmalting.	93	—, in the matter of, ex parte	
Aldren, Savage v.	649	Peyton	200
Allen v. Imlett	667	—, in the matter of, ex parte	
Alsop, ex parte, re Dicken	633	Hammond	464
Anderson, ex parte, in the matter		—, in the matter of, ex parte	
of Platt and Kaye	38	Perrin	510
—, ex parte, in the matter		—, in the matter of.	523
of Gilchrist	397	—,	615
— v. Hampton	610	Ansell, ex parte	647
—, re, ex parte Palon ..	679	Ansley, ex parte, re Tickell	292
Andrews, ex parte, re Emett ...	675	Appleton, ex parte, in the matter	
		of Hughes and Fisher	68

TABLE OF CASES REPORTED.

	Page		Page
Arbouin v. Hanbury	642	Bartlett, Oliver v.	656
Arbouin and others v. Tritton and others	680	Bartlett, Oliver v.	637
Armstrong v. Stratton	614	Bassivi v. Serra	617
Astell, ex parte, in the matter of Still	396	Battier, ex parte, in the matter of Battier	426
Atkinson, ex parte, in the matter of Goodchild	215	Beaumont, Geary v.	638
Atkins, ex parte, in the matter of Atkins	479	Beasley, in the matter of, ex parte Dunlop	253
—— v. Seward	630, 606	Bebb, ex parte	615
Attwood, Hammond v.	632	Bedford v. Deakin	671
Aubert, in the matter of, ex parte Stevens	389	Bell, in the matter of, ex parte Crump	3
Agton, Reed v.	642	——, Wright v.	685
B.		——, Newland v.	690
BACON, ex parte	633	Bellott, ex parte	670
Baglehole, ex parte	665	Benjamin, ex parte, in the mat- ter of Phillips	41
Bainbridge v. Pinhorn	135	Bennett, ex parte, in the matter of Garland	283
Bakewell, in the matter of, ex parte Smith	149	——'s bail	615
Baker v. Langhorn	681	——, Hitchin v.	631
Bamford, ex parte	621	Bentley, in the matter of, ex parte Brookes	257
Bank of England, Eyre v.	419	Berney v. Davison	603
——, ex parte, re Stevens	615	—— v. Vyner	604
——, ex parte	675	Berry, ex parte	693
Bank of Scotland, ex parte	676	Biggs, Hart v.	612
Barber, ex parte, in the matter of Shaw	493	Bignold and Kent, ex parte, re Samuel Charles	612
——, Warner v.	626	Bilke, Butts v.	624, 625
——, Marston v.	667	Billiald, ex parte, in the matter of Billiald	220
Baring's case, Devaynes v. Noble	660	Billings v. Waters	651
Barker, in the matter of, ex parte Fisher	188, 676	Birch, ex parte	623
——, in the matter of, ex parte Dale	365	Birdwood, ex parte, in the mat- ter of Symmonds	99
——, Delauney v.	657	Birdwood v. Raphael	653
——, Parker v.	691	Birnie, Pasmore v.	685
		Biston, in the matter of, ex parte Leigh	132

TABLE OF CASES REPORTED.

vii

Page	Page
Blackburn, in the matter of, ex parte Bolitho 100	Brockliss, ex parte, in the matter of Brockliss 466
Blagden, ex parte 640, 681	Brocksopp, ex parte, in the matter of Kensington 304
Bogen, ex parte, in the matter of Bogen 137	Brookes, ex parte, in the matter of Bentley 257
Boldero, re, ex parte Pease. 620, 636 645	Brooks v. Sowerby 625, 626
Bolitho, ex parte, in the matter of Blackburn 100	Brown, in the matter of, ex parte Harford 68
Bolton, ex parte, in the matter of Mackenzie 7	——, in the matter of, ex parte Prossor 77
Bonbonus, ex parte, re Lemon . 618	Browne, in the matter of, ex parte Rathbone 215
Boss, in the matter of, ex parte Hensor 427	Brown, in the matter of, ex parte Timbrel 305
Bowden v. Glasson 606	Brown v. Croome 648
Bowler, ex parte, in the matter of Wetherelt 258	Browne, Patten v. 691
Bowles, in the matter of, ex parte Rogers 490	Bruin, in the matter of, ex parte Stone 225
Boyle, ex parte, in the matter of Warrington 247	Brydges, Hurd v. 614
Bradley, Emmett v. 636	Buchanan and Benn, re, ex parte Harris 617
Brandon v. Brandon 682	——, ex parte, (Glasgow Bank) 608
Brandram v. Wharton 649	Buckland, ex parte, in the matter of Thick 214
Bray, Gibson v. 656	Buckley, ex parte, in the matter of Dickenson 367
Bray v. Hine 685	Budgett, in the matter of, ex parte Brine and Parsons 19, 108
Brickwood, in the matter of, ex parte Parr 191	Bulkley v. Lord 637
Brickwood v. Miller 613	Burgess, ex parte, in the matter of Burgess 233
Bridger, in the matter of, ex parte Quantock 189	——, in the matter of, ex parte Greenway 412
Bridges, Hogg v. 626	Burrell v. Jones 613
Bridges, King v. 638	Burton, Sampson v. 654, 668
Brighton, ex parte 652	—— v. Chatterton 614, 685
Brightwen, ex parte, in the matter of Wells 148	Bury, ex parte, in the matter of Mather 393
Brine, ex parte, in the matter of Budgett 19, 108	
Britannia Doe—dem. Coleman against 669	

	Page		Page
Butler v. Carver.....	602	Clayton's case. Davaynes v.	
—, Emmet v.	637	— Noble	660, 659
Boots v. Bilke	624, 625	Cleasby, Morris and others v. .	680
—, C.		Clent, Nichols v.	649
CALVERT, Clark v.	606	Cliffe, in the matter of, ex parte	
Campbell, M. P. Hunter v.	650	— Hossack	390
—, Duff v.	668	Cohen v. Templar	670
Cameron and others v. Smith		Colbeck and Co. in the matter	
— and others	666	— of, ex parte Wilson, and ex	
Caponhurst, ex parte, in the		— parte Todd	48
— matter of Caponhurst.	476	Coles, in the matter of, ex parte	
Capper v. Desanges	602	— Mills	230
Carstairs, ex parte, in the mat-		—, ex parte, in the matter of	
— ter. of Thomas Slade the		— Coles	242, 256
— elder and Thomas Slade the		—, ex parte, in the matter of	
— younger	560	— Coles and Galpin	293
— and others v. Stein and		— and Galpin, in the matter	
— others	669, 692	— of, ex parte Coles	293
Carter v. Dean	690	Colman, Nowers v.	5
— v. Hart	610	—, in the matter of, ex	
Carver, Butler v.	602	— parte North	396
Cassidy's case	628	Company of Proprietors of the	
Cawthorne, ex parte.	602, 645, 692	— Grand Western Canal, Ger-	
Cawthorne, ex parte	624, 641	— vis v.	637
Chalmers v. Page	606	Cook, ex parte, in the matter of	
Champney, in the matter of, ex		— Watkins and Ledger	319
— parte Sherman	462	Cooper, Freen v.	605
Chard, in the matter of, ex		Copeland v. Stephens	678
— parte Emery	422	Corf, in the matter of, ex parte	
Charles, Samuel, re, ex parte Big-		— Janson	227, 667
— nold and Kent, assignees of Ro-		Corrie, Onslow v.	647
— bert Leeds, a bankrupt.	612	Corry, ex parte, in the matter of	
Chatterton, Burton v.	614, 685	— Mulleus	314
Chater, ex parte, in the matter		Carsen v. Dubois	670
— of Crosby	290	Cory and others v. Gertchen ..	640
Chesewright, ex parte	670	Cossens, ex parte, in the matter	
Cheshire, in the matter of, ex		— of Worrall	681
— parte Richardson	480	Cousins, Gilman v.	636
Child, in the matter of	425	Coward, Dickinson v.	636
Clark v. Calvert	606	Cowan, ex parte	646

TABLE OF CASES REPORTED.

ix

	Page		Page
Cowley, Litt v.	604, 686	De Tastet against Walker	168
Cox, Porter v.	469	— v. Sharp	667
Craven v. Ryder	686	Devaynes v. Noble	658, 659, 666
Crawshaw v. Maule	662, 691	Dicken, ex parte, in the matter	
Crooke v. Edwards	636	of Dicken	1713
Croome, Brown v.	648	—, re, ex parte Alsöpp	653
Crosbie, Van Sandau v.	624, 678	Dickenson, in the matter of, ex	
Crosby, in the matter of, ex		parte Buckley	367
parte, Chater	290	Dickenson, Matthews v.	637, 667
Crowley's case	264	Dickinson v. Coward	636
— and others, Harlow v.	273	Dinsdale v. Eames	624
— v. Impey	628	Dister, ex parte, in the matter of	
Crowther, ex parte, in the matter		Tompson	634
of Crowther	480	Dixon, ex parte, in the matters	
Crump, ex parte, in the matter		of John and Henry Jackson's	
of Bell	3	and others, and Thomas Goss	
Crundwell, ex parte	627	land	552
Cutten, ex parte, in the matter of		— v. Ewart	64, 682
Hughes and Fisher	68	— v. Hamond	670
D.		Dodson, ex parte, in the matter	
DAVISON, ex parte, in the		of Greenwood	178, 225
matter of Seaton	31	Doe, dem. Radnor v. Taylor	668
Davies, ex parte, in the matter		—, dem. Coleman v. Brittain	669
of Davies	80	Doncaster, the Corporation of, v.	
Davison, Berney v.	603	ex parte, in the matter of	
Davis v. Living	605	Wright	663
—, Harmer v.	635, 666	Dorrien, Lucas v.	632, 692
Davies, Ray v.	667	Doubleday, re, ex parte Fellows	688
Daley, ex parte, in the matter of		Drakeford, Waller and another, v.	
Barker	365	assignees of Smith, v.	665
Dannek, in the matter of, ex		Drakeley, in the matter of, ex	
parte, Smith	395	parte Paddy	655, 666
Dark, in the matter of, ex parte		Dubois, Corsen v.	670
Maundrell	83, 648	Ducane, ex parte, in the matter	
Deakin, Bedford v.	671	of	18
Dean, Carter v.	690	Duff v. Campbell	668
Delaney v. Barker	657	Dunkin, in the matter of, ex	
De Mendez, Holyland v.	608	parte Slatford	1
Deanges, Capper v.	602	Dunlop, ex parte, in the matter	
—, Thomas v.	603	of Beasley	658

TABLE OF CASES REPORTED.

	<i>Page</i>		<i>Page</i>
Dunlop, ex parte.....	679	Fisher, ex parte, in the matter	
Durant, ex parte, in the matter		of Barker	188; 676
of Enfield.....	201	——, Fox against	656
E.		Flanagan v. Watkins	671
EAGLE, ex parte, in the matter		Fleming v. Hayne	623
of Taylor	548	Flint, Key v.	653
Eames, Dinsdale v.	624	——, ex parte	680
Edwards, ex parte, in the matter		Forbes, Odwin v.	57
of Edwards	232	Foudrinier, Hoffman v.	631
——, ex parte, in the matter		Fowles, ex parte, in the matter of	
of Riddall	411	Nickson	98
——, Crooke v.	636	Fox against Fisher.	656
Ehrenstrom, re, ex parte Vogel .	627	Franklyn, ex parte, in the matter	
Elder, ex parte	675	of James	382
Ellis, Mills v.	602	Frazer, in the matter of, ex	
Elwall, Stephens and others, as-		parte Monro	300
signees of Spencer, v.	604	Freeman and Co. in the matter of,	
Emery, ex parte, in the matter of		ex parte Greenwood	237
Chard	422	——, ex parte, in the matter	
——, ex parte, in the matter of		of Henderson and Morley . .	471
Emery	527	Freen v. Cooper	605
Emmett v. Bradley	636	French, in the matter of, ex parte	
Emmet v. Butler	637	Peel	394, 457
Emmet, re, ex parte Andrews... 675		Fry, ex parte	677
Emily and others v. Guy	693	G.	
Enfield, in the matter of, ex parte		GARDINER, ex parte, in the	
Durant.....	201	matter of Sabatier	458
Ewart, Dixon v.	94, 682	Garland, in the matter of, ex parte	
Lyre v. Bank of England	419	Miller and Bate, ex parte Ben-	
F.		nett	283
FAIRBURN, Hay v.	683	Gascoigne, Hutchinson v.	613
Farenden, ex parte, in the matter		Geary, v. Beaumont	638
of Farenden	34	Geller, ex parte	675
Fector, ex parte, in the matter of		Gertchen, Cory and others v. .	640
Pitman	428	Gerton, in the matter of, ex parte	
Fellows, ex parte, re Doubleday 688		Kirk	478
Felton, in the matter of, ex parte		Gervis v. the Company of Pro-	
Greenwood	323	prietors of the Grand Western	
Fisher, in the matter of, ex parte		Canal	637
Ross	125	Gibson v. Bray	656

TABLE OF CASES REPORTED.

xi

Page	Page
Gilchrist, in the matter of, ex parte Anderson 397	Greenwood, in the matter of, ex parte Dodson 178, 225
Gillet, ex parte Bacon. 633	———, ex parte, in the matter of Whately, in the matter of Freeman and Co. 237
Gillingham v. Laing 603, 691	———, ex parte, in the matter of Felton 323
Giftman v. Cousins 636	———, Wilson v. 661
Girling, Wells v. 640	Grinstead, in the matter of, ex parte Loxley 456
Gitton, ex parte, in the matter of Gitton 549	Groome, ex parte, in the matter of 29
Glasson, Bowden v. 606	Gunton, re, ex parte Radcliffe 489
Glendinning, ex parte, in the matter of Renton 517	Gurr v. Rutton 656
Glennie and others, Mair and others v. 655	Guy, Emly and others v. 693
Glenny, King v. 639	H.
Godden, Page v. 647	HAGGER, Harmer v. 683
Goodchild, in the matter of 322	Hale, re, ex parte Small 626
———, in the matter of, ex parte Hustler 171, 621	Hale v. Small 626, 691
Goodchild, in the matter of, ex parte Atkinson 215	Halket, ex parte 683
Goodman the younger, ex parte, re Goodman the elder 677	Hammock, Hankey v. 240
Goodwin v. Lightbody 686	Hammond, ex parte, in the matter of 464
Gough, in the matter of 85	Hammond v. Attwood 632
Graham, in the matter of 47, 529	Hampton, Anderson v. 610
Graham and others v. Russell 680, 681	Hamill v. Stokes 603, 632, 641
Graham, Stewart v. 615	Hamlyn, in the matter of, ex parte Hearn 165
Grant, ex parte, in the matter of Richardson 90	Hamond, Dixon v. 670
Gray and others, re, ex parte Worthington 677	Hanbury, Arbouin v. 642
Gregson, ex parte 685	Hancock v. Welsh and Cooper 612
Green, re, ex parte Horsley and another 689	Hankey, Twogood v. 65
Greenway, ex parte, in the matter of Burgess 413	——— v. Hammock 310
———, in the matter of, ex parte Scholey 476	Hanson v. Stevenson 647
	Harding, ex parte, in the matter of Hunt 24, 27
	Harford, ex parte, in the matter of Brown 38
	Harlow v. Crowley and others 273

	Page		Page
Harmer v. Davis	635, 666	Henderson v. Sansom	667, 668
Harmer v. Hagger	623	Henderson and Morley, in the	
Harrison, ex parte, in the matter		matter of, ex parte Freeman ..	471
of	17	Henderson, ex parte, in the matter	
Harrison, ex parte, in the matter		of Henderson	557
of Harrison	246	Hensor, ex parte, in the matter	
Harris, ex parte, re Buchanan and		of Boss	427
Benn	617	Hewes v. Mott	670, 671
—, ex parte	660, 661	Hewitt, ex parte, in the matter of	
— v. William and Peter Lu-		Morris	388
nell	640	Heygate, ex parte, in the matter	
Hart, Carter v.	610	of Humble	442
— v. Biggs	612	Hibbert, Jones v.	620
— v. White	684	Higgins, in the matter of, ex	
—, Minchin v.	668	parte Morgan	109
Hartop, Toussaint v.	655	Higinbotham v. Holms	650
Hartley and others against Smith	368	Hine, Bray v.	685
Hastings v. Wilson	612	Hitchin v. Bennett	631
Hatherway, ex parte, re Hather-		Hobbes, ex parte, in the matter	
way	685	of Tanner	134
Haugh, in the matter of, ex parte		Hodges, ex parte, in the matter of	
Warwick	326	Moore	524
Harvey, ex parte, in the matter		Hodgson, ex parte	650
of Humphreys	493	Hodgkinson, ex parte	624, 634, 661
— v. Morgan	605, 667, 670	Hodson, in the matter of, ex parte,	
— re, ex parte Pigou	676	Richardson	202, 421
Hawkins, ex parte, in the mat-		Hoffman v. Foudrinier	631
ter of Holmes	520	Hogg v. Bridges	626
Hawkins v. Ramsbottom	668	Holden, ex parte	669
Hay v. Monkhouse	656	Holmes, in the matter of, ex	
—, Monkhouse v.	656, 657	parte Hawkins	580
— v. Fairburn	683	Holmes v. Wainwright	622
Hayne, Fleming v.	623	Holmes, Higinbotham v.	650
Hearn, ex parte, in the matter of		Holt, ex parte, in the matter of	
Hamlyn	165	Wood	429
Heaton, ex parte, in the matter		Holyland v. De Mendez	608
of Moxon	386	Hopper and others, assignees of	
Heming, ex parte, in the matter		Mowbray and others, v. Rich-	
of Powell	350	mond	604

TABLE OF CASES REPORTED.

xiii

	Page		Page
Horablower and others v. Proud.	621	Hutchinson v. Gascoigne	613
Hornby, ex parte, in the matter		Hayne, ex parte	623
of Tarleton	331	I.	
Horsley, ex parte	651	IMLETT, Allen v.	667
Horne, ex parte	652	Impey, Crowley v.	628
Horsley and another, ex parte, re		Inghiss v. Macdougall	671
Green	689	Inman, ex parte, in the matter	
—, ex parte	651	of Inman	129
Hossaek, ex parte, in the matter		Innes, ex parte, in the matter of	
of Cliffe	390	Scott	337
Houlton's case, Derwyns v.		Irving, ex parte, in the matter of	
Noble	660	M'Kenzie	423
Howarth, Kinder v.	612	J.	
Huckey, ex parte	680	JACKSON, Akhurst v.	603
Hughes v. Morley	642	Jacksons and others, and Tho-	
— and Fisher, in the matter		mas Gowland, in the matters	
of, ex parte Culton, ex parte		of, ex parte Hunter, ex parte	
Appleton	68	Dixon	554
—, in the matter of, ex parte		Jacobs, Worrell v.	632
Williams	13	James, in the matter of, ex	
Hull v. Pickersgill	605, 616	parte Franklyn	332
Humble, in the matter of, ex parte		—, Rogers v.	665, 666
Heygate	442	Janson, ex parte, in the matter	
Humphreys, in the matter of, ex		of Corf	227, 677
parte Harvey	493	Jepson, ex parte	613
Humphries v. Wilson	678	Jervis v. Taleur	618
Hunt, in the matter of, ex parte		Jones v. Hibbert	620
Harding	24, 37	— and others, ex parte	682
—, Snelgrove v.	667	—, Burrell v.	613
— v. Pasman	670	Joseph, ex parte	623
Hunter, ex parte, in the matters		— and Hughes, in the mat-	
of Henry Jackson, John Jack-		ter of, ex parte Williams	13
son and others, and Thomas		K.	
Gowland	552	KAY v. Stead	635
— v. Campbell, M. P.	650	Kemp v. Potter	634
Hurd, ex parte, in the matter of		Kensington, in the matter of, ex	
Partington	45	parte Brocksopp	304
— v. Brydges	614	Kersley, ex parte, in the matter	
Hustler, ex parte, in the matter		of Russell	477
of Goodchild	171, 621	Key, ex parte	609

	Page		Page
Key v. Flint	653	Living, Davis v.	605
Kilner, ex parte, in the matter of		Lord, Bulkeley v.	637
Kilner	104	Lowndes v. Taylor	667
Kinder v. Howarth	612	Loxley, ex parte, re Grinstead ..	456
Kingdon, ex parte	684	Lucas v. Dorrien	632, 692
King v. Abbott	614	Lunell, William and Peter, Har-	
— v. Page .. 602, 604, 616, 639,	643	ris v.	640
— v. Bridges	638	M.	
— v. Glenny	639	MACBAR, Stapleton v.	615
— v. Adams	639	Mac Donnell, ex parte, in the	
Kirby, ex parte Todd, ex parte,		matter of Mac Donnell	399
in the matter of Moore, Ten-		Mac Donnel, Robinson v.	683
nant, and Foster	511	Macdougall, Inglis v.	671
Kirk, ex parte, in the matter of		McKenzie, in the matter of, ex	
Gorton	478	parte, Irving	423
L.		Mackenzie, in the matter of, ex	
LAING, Gillingham v.	603, 691	parte Bolton, ex parte Swanzy	7
—, Walker v.	620, 665	Mac Millan, ex parte, in the	
Lane, in the matter of, ex parte		matter of Sowerby	287
Price	230, 689	Mair and others v. Glennie and	
Langhorne, Baker v.	681	others	655
Lark, in the matter of, ex parte		Mallam, in the matter of, ex	
Young	179, 656	parte Wheeler	25
Lant, Rowe v.	637	Marsh and another, assignees	
Law, ex parte, in the matter of		of Harrison and others, v.	
Oakden	110	Meager	635
Lawson and others, assignees of		Marston v. Barber	667
Skaffner, v. Robinson	635	Mason and others v. Richmond.	604
Ledbury v. Smith	639	Matthews v. Dickenson	637, 667
Leicester, Woolcot v.	614	Mather, in the matter of, ex	
Leigh, ex parte, in the matter of		parte Bury ..	393
Biston	132	Maule, Crawshaw v.	662, 691
—, in the matter of, ex parte		Maundrell, ex parte, in the mat-	
Parr	191	ter of Dark	83, 618
Lemon, re, ex parte Bonbonus ..	618	Meager, Marsh and another, as-	
Levi, ex parte, in the matter of		signees of Harrison and others,	
Sutton	75	v.	635
Lightbody, Goodwin v.	686	Medex, Watson v.	605
Litt v. Cowley	604, 686	Meyer, assignees of, v. Sifton ..	636
		Mills v. Elton	602

TABLE OF CASES REPORTED.

xv

	Page		Page
Mills, ex parte, in the matter of		N.	
Coles	231	NEALE, ex parte, in the matter	
Müller and Bate, ex parte, in the		of Norton	111
matter of Garland	283	Neave, Twogood v.	65
—, Brickwood v.	613	Newland v. Bell.	690
Milne, Toovey v.	663	Nias and White, in the matter	
Milner, ex parte.	688	of, ex parte Scott	275
Minchin v. Hart	668	— v. Adamson	613
Moline, ex parte	616, 621	Nichols v. Clent.	649
Monkhouse, Hay v.	636	Nicholson and Brown, in the	
— v. Hay.	656, 657	matter of, ex parte Wilson. .	306
Monro, ex parte, in the matter of		Nickson, in the matter of, ex	
Frazer	300	parte Fowles.	98
Moore, Tennant, and Foster, in		Noble, Vulliamy v.	610
the matter of, ex parte Kirby,		— v. Adams	654
ex parte Todd.	511	—, Devaynes v. . .	658, 659, 660
—, ex parte, in the matter		Norfolk, ex parte	662
of Moore	521	Northcote, Peele v.	680, 682
—, in the matter of, ex		North, ex parte, in the matter	
parte Hodges.	524	of Colman.	386
—, in the matter of, ex		Norton, re, ex parte Neale . . .	111
parte Stonehouse	531	Nowers v. Colman.	5
— v. Wright	637	Nunn and Barber, in the matter	
Morgan, Harvey v. . .	605, 667, 670	of, ex parte Robinson.	113
—, ex parte, in the matter		O.	
of Higgins.	109	OAKDEN, in the matter of, ex	
Morley, Hughes v.	642	parte Law.	110
Morris, in the matter of, ex		Odwin v. Forbes	57
parte Hewitt	388	Oliver v. Bartlett.	656
— and others v. Cleasby . .	680	— v. Bartlett	637
Morton, ex parte, in the matter		Onslow v. Corrie	647
of Morton	42	Overseers of St. Martin's in the	
Mott, Hewes v.	670, 671	fields v. Warren	623
Mousely, Winter v.	676	P.	
Moxon, in the matter of, ex		PADDY, ex parte, in the matter	
parte Heaton	386	of Drakeley	233, 666
Mullens, in the matter of, ex		Page, ex parte.	628
parte Corry	314	— v. Godden	647
Munford, Randall v.	601	—, King v. G02, 604, 616, 639, 618. .	

	Page		Page
Page, Chalmers v.	608	Pitman, in the matter of, ex parte	
Palmer's case. Devaynes v. No-		Fector	428
ble	660	Platt and Kaye, in the matter of,	
—, in the matter of, ex		ex parte Anderson	38
parte Price	221	Porter v. Cox	469
—, Price v.	609	Powell, in the matter of, ex parte	
Palon, ex parte, re Anderson ...	679	Heming	359
Parker, ex parte, in the matter of		—, Wackerbarth v.	495
Parker	313	Potter, Kemp v.	634
— v. Barker	691	Power and Warwick, in the mat-	
Parks, ex parte, in the matter of		ter of, ex parte Smith	355
Price	332	Price, ex parte, in the matter of	
Parr, ex parte, in the matter of		Lane	230, 689
Brickwood, in the matter of		—, ex parte, in the matter of	
Leigh	191	Palmer	221, 609
Parson, ex parte, in the matter		—, in the matter of, ex parte	
of Budgett	19, 108	Parks	332
Parson, Hunt v.	676	—, in the matter of, ex parte	
Pasmore v. Birnie	685	Pearse and Prothero	525
Partington, in the matter of, ex		Probinia v. Roberts	682
parte Herd	45	Prosser, ex parte, in the matter	
Patten v. Browne	691	of Brown	77
Pearse and Protheroe, ex parte,		Prosser v. Smith	603
in the matter of Price	525	Proud, Hornblower and others v.	620
Pearce, ex parte, re Boldero. 620, 636,		Q.	
—	645	QUANTOCK, ex parte, in the	
Peale, ex parte, in the matter of		matter of Bridger	189
French	394, 457	R.	
— v. Northcote	680, 681	RADCLIFFE, ex parte, re Gun-	
Reamberton, Thomas v.	647	ton	489
Reatin, ex parte, in the matter of		Ramsbottom, Hawkins v.	668
—	510	Ranken, ex parte	689
Peyson, ex parte, in the matter		Randall v. Mumford	601
of —	200	Raphael, Birdwood v.	653
Phillips, in the matter of, ex		Rathbone, ex parte, in the mat-	
parte Benjamin	41	ter of Browne	215
Pickford, Rowe v.	686	Rawson v. Walker	612
Pickersgill, Hull v.	605, 616	Ray v. Davies	667
Pigou, ex parte, re Harvey	676	Reader, ex parte, in the matter	
Pinhorn, Bainbridge v.	135	of Willats	381

TABLE OF CASES REPORTED.

xvii

	Page		Page
Reed, ex parte, in the matter of		Russell, in the matter of, ex parte	
Sowerby	430	Kersley	477
— v. Ayton	642	—, ex parte.....	616, 646, 694
Reid, ex parte, re Ritchie	239	—, Graham and thers v.	
Ranton, in the matter of, ex parte		680, 681
Glendinning	517	Rutton, Gurr v.	656
Richards, in the matter of,		Ryder, Craven v.	686
ex parte Grant	90	— v. S.	
—, ex parte, in the mat-		SABATIER, in the matter of, ex	
ter of Hodson	262, 421	parte Gardiner.....	458
—, ex parte, in the mat-		Salisbury, in the matter of, ex	
ter of Cheshire	480	parte	245
Richmond, Hopper and others,		Sampson v. Burton	654, 668
assignees of Mowbray, v.	604	Sanderson, ex parte	672
—, Mason and others v.	604	Sansom, Henderson v.	667, 668
Riddall, in the matter of, ex parte		Saunders, in the matter of, ex	
Edwards	411	parte Staff.....	249, 431
Rigby, ex parte	624	Savage v. Aldren	649
Ritchie, in the matter of, ex parte		Schmaling, ex parte, in the mat-	
Reid	239	ter of Aldebert and Co.	96
Roach, in the matter of, ex parte		Scholey, ex parte, in the matter	
Goppit	81	of Greenway	476
Roberts, in the matter of, ex		Scott, ex parte, in the matter of	
parte Tibbley	287, 465, 613	Nias and White	275
—, Smith v.	615	—, in the matter of, ex parte	
—, Probbia v.	682	Ianes	337
Robinson, ex parte, in the mat-		Seaforth, Lord, ex parte	649
ter of Nunn and Barber.....	113	Seaton, in the matter of, ex parte	
—, Lawson and others,		Davison	31
assignees of Shifner, v.	635	Sefton, assignees of Meyers v.	636
— v. Mac-Donnell	683	Seward, Atkins v.	606, 630
Roffey, ex parte	646, 649	Serra, Bassivi v.	617
Rogers v. James	665, 666	Sharp, De Tastet v.	607
—, ex parte, in the matter		Shaw, in the matter of, ex parte	
of Bowles	490	Barber	493
Ross, ex parte, in the matter of		—, ex parte	665
Fisher	125	Shayle, ex parte, in the matter of	
Rothschild, Sheldon v.	633	Shayle	246
Rowe v. Lant	637	Sheath, in the matter of, ex parte	
— v. Pickford	686	Watson	449

	Page		Page
Sheath, in the matter of, ex parte		Southwood v. Taylor.....	678
Smith.....	493	Sowerby, in the matter of, ex	
Sheldon v. Rothschild.....	653	parte Mac Millan.....	287
Sherman, ex parte, re Champney	462	——, in the matter of, ex	
Shynn, Tomlinson and White v.	639	parte Reed.....	430
Sikes, ex parte, in the matter of		——, Brooks v.	625, 626
Wilkinson.....	349	Sparrow, ex parte.....	670
Simpson's case.....	424	Staff, ex parte, in the matter of	
——, ex parte.....	617	Saunders.....	249, 431
Slade the elder and Slade the		Stapleton v. Macbar.	615
younger, in the matter of, ex		Stead, Kay v.	635
parte Carstairs.....	560	Stein and others, Carstairs and	
Slatford, ex parte, in the matter		others v.	669, 692
of Dunkin.....	1	Stephens and others, assignees of	
Sleech's case.....	623	Speucer, v. Elwall.....	604
—— case, Devaynes v. No-		——, Copeland v.....	678
ble,.....	658, 659	Stevens, ex parte, in the matter	
Small, ex parte, re Hale.....	626	of Aubert.....	389
——, Hale v.	626, 691	——, re, ex parte the Bank of	
Smith, ex parte, in the matter of		England.....	615
Bakewell.....	149	Stevenson, Hanson v.....	647
——, ex parte, in the matter		——'s case.....	651
of Whittington.....	235	Stewart v. Graham.....	615
—— and Hampshire, in the		Still, in the matter of, ex parte	
matter of, ex parte Williamson	546	Astell.....	396
——, ex parte, in the matter of		Stokes, Hamil v.	608, 632, 641
Power and Warwick.....	355	Stonehouse, ex parte, in the mat-	
——, Hartley and others v.	368	ter of Moore.....	531
——, ex parte, in the matter		Stone, ex parte, in the matter of	
of Dannek.....	395	Bruin.....	255
——, ex parte, in the matter		Story, ex parte, in the matter of	
of Sheath.....	492	Story.....	70
——, Prosser v.....	602	Stratton, Armstrong v.	614
—— v. Roberts.....	615	Sutton, in the matter of, ex parte	
——, ex parte	262, 26, 646	Levi.....	75
——, Ledbury v.....	639	Swanzy, ex parte, in the matter	
Smith and others, Cameron and		of Mackenzie.....	7
others v.....	666	Symmons, in the matter of, ex	
Snelgrove v. Hunt.....	667	parte Birdwood.....	99
Soppit, ex parte, re Roach.....	81		

TABLE OF CASES REPORTED.

xix

	Page		Page
T.		Treacher, ex parte, in the matter	
TALEUR, Jervis v.	618	of	17
Tanner, in the matter of, ex parte		Trew, ex parte	631
Hobbes	134	Tritton and others, Arbouin and	
Tarleton, ex parte	643	others v.	680
—, in the matter of, ex		Trustram, ex parte, in the mat-	
parte Hornby	351	ter of Trustram	464
Taylor, in the matter of, ex parte		Trustrum, ex parte, in matter of	
Terrell	345	Trustrum	550
—, in the matter of, ex parte		Turnbull, in the matter of, ex	
Eagle ..	548	parte Wiltshire ..	232
— v. Young	648	Twogood v. Hankey, Twogood	
—, Lowndes v.	667	v. Neave	65
—, Doe dem. Radnor v. ..	668	—, ex parte	621, 668
—, Southwood v.	678	V.	
Templar, Cohen v.	670	VAN Saudau v. Crosbie ..	624, 678
Terrell, ex parte, in the matter of		Vere, ex parte	675
Taylor	345	Vogel, ex parte, re Ehrenstrom ..	627
Thick, in the matter of, ex parte		Vulliamy v. Noble	610
Buckland	214	Vyner, Berney v.	604
Thislewood, ex parte, 609, 637, 638		Vypond, ex parte	635
676, 677		W.	
Thomas v. Desanges	603	WACKERBARTH v. Powell ..	495
— v. Pemberton	647	Wainwright, Holmes v.	622
Thorley, ex parte, in the matter		Walker, Rawson v.	612
of Roberts	231, 465, 613	— v. Laing	620, 663
Tickell, in the matter of, ex parte		—, De Tastet against	153
Ansley	292	Waller and another, assignees of	
Timbrel, ex parte, in the matter		Smith, v. Drakeford	605
of Brown	305	Ward v. Abraham	630
Todd, ex parte, in the matter of		Warde's case, Devaynes v. Noble	660
Colbeck and Co.	48	Waring, Inglis, and Clarke, ex	
—, ex parte Kirby, ex parte,		parte	679
in the matter of Moore, Ten-		Warner v. Barber	626
nant and Foster	511	—, ex parte	672
Tomlinson and White v. Shynn ..	639	Warren, Overseers of St. Martin	
Tompson, in the matter of, ex		in the fields v.	623
parte Dister	234	Warrington, in the matter of, ex	
Toovey v. Milne	663	parte Boyle	247
Toussaint v. Hartop	655		

TABLE OF CASES REPORTED.

	<i>Page</i>		<i>Page</i>
Warry, ex parte	651	Williams, ex parte, in the matter	
Warwick, ex parte, in the matter		of Joseph and Hughes.....	13
of Haugh.....	326	Williamson, ex parte, in the mat-	
Waters, Billings v.	651	ter of Smith and Hampshire	546
Watkins, Flanagan v.	671	Wilson, ex parte, in the matter	
Watkins and Ledger, in the mat-		of Colbeck and Co.	48
ter of, ex parte Cook	319	——, ex parte, in the matter of	
Watson, ex parte, in the matter		Nicholson and Brown.....	306
of Sheath	449	——, Hastings v.	612
—— v. Medex	605	—— v. Greenwood	661
——, ex parte	662	——, Humphries v.	678
Wells, in the matter of, ex parte		——, ex parte	686
Brightwen	148	Wiltshire, ex parte, in the mat-	
——, v. Girling	640	ter of Turnbull.....	232
Welsh v. Welsh	671	Winter v. Mouseley	676
—— and Cooper, Hancock v. .	612	Wood, ex parte, in the matter of	
Wetherelt, in the matter of, ex		Inman	129
parte Bowler	258	——, in the matter of, ex parte	
Wharton, Brandram v.	649	Holt	429
Whately, in the matter of, ex		Woolcot v. Leicester.....	614
parte Greenwood	237	Worrall, in the matter of, ex	
Wheeler, ex parte, in the matter		parte Cossens	531
of Mallam	25	Worrell v. Jacobs	632
White, Hart v.	684	Worthington, ex parte, re Gray	
Whitbread, ex parte	651	and others.....	677
Whittington, ex parte, in the		Wright, in the matter of, ex	
matter of Adams	87	parte the Corporation of Don-	
Whittington, re Whittington ...	235	caster	463
——, in the matter of,		——, Young v.	603, 641
ex parte Smith	235	——, ex parte	609
Wilbeam, ex parte, in the matter		—— v. Bell.....	685
of Wilbeam	459	——, Moore v.	637
Wilkinson, ex parte, in the mat-			
ter of Wilkinson and Goodall .	197		
—— in the matter of, ex			
parte Sikes.....	349		
Willats, in the matter of, ex			
parte Reader.....	381		

Y.

YOUNG, ex parte, in the matter	
of Lark	179, 656
—— v. Wright.....	603, 641
——, Taylor v.	648

C A S E S

IN

B A N K R U P T C Y.

Ex parte SLATFORD.—In the Matter of DUNKIN. MIC. TERM.
Nov. 9.
1816.

A CREDITOR of the Bankrupt, of the Name of *Williams*, on the 26th of *October*, 1816, struck a Docket against him, and on the Evening of the 30th of *October* his Solicitor's Clerk paid at the Patent-office £5, on account of £5.2s.8d., the Fees payable there, by way of bespeaking the Commission, but he did not pay the 2s. 8d., as the Clerk at the Office could not give him Change for a 11. Note, and supposing the Fees at the Patent-office were all that were necessary to be paid, he went away without having paid the Secretary's Fees. By the Practice of the Secretary's Office, a Commission is not considered as ordered until all the Fees are paid. On the 31st of *October*, the Time required by the General Order having expired, the Petitioner struck a Docket, and bespoke a Commission, paying all the Fees in the regular Way. On the 1st of *November* an *ex parte* Application was made to the Court on the Ground of the Mistake made by the Solicitor's Clerk, and, upon that Application, the Lord Chancellor ordered the first Commission to be sealed. This Petition was presented by the Petitioning Creditor to the second Commission, and it prayed that the first Commission might be superseded, or that the Petitioner might be paid all the Costs he had incurred.

A solicitor having struck a docket, ordered, within the regular time, the commission to be sealed, but through the mistake of his clerk the fees were not paid to the secretary. Another solicitor then struck a docket against the same bankrupt. The Lord Chancellor held, that the mistake of the clerk was a sufficient ground for the court to uphold the first commission as the general order, 29th Dec. 1806, ought not to be construed too strictly.

CASES IN BANKRUPTCY.

1816.

Ex parte
SLATFORD.
—In the
Matter of
DUNKIN.

Mr. *Collinson*, in support of the Petition, insisted upon the General Order (a) and that the Petitioner ought not to suffer by the Negligence of the opposite Party.

Mr. *Wilson*, *contra*, cited *ex parte Freeman* 1 *Rose B. C.* 380; 1 *Ves.* and *Beam.* 34.

The LORD CHANCELLOR,

After reading the Order, said (a) this Order is imperative upon the Secretary, who cannot take upon himself to relax it; but if the Case make it necessary, a Petition must be presented, and the Order is not so unbending as not to yield to Circumstances. Suppose a Clerk going to bespeak a Commission were to break his Leg? or suppose he were to be robbed? can it be said, if owing to such an Accident, the Commission was not ordered to be sealed within the Time required by this General Order; that it could not be supported? Let the Commission, issued on the first Application, stand. The Fees taken in the Office on the second Application must be returned (b)

(a) " General Order, 29th
" December, 1806. And it is
" further ordered, that in case
" any Person who shall hereaf-
" ter strike any Docket, shall
" not within four Days next af-
" ter such Docket shall be
" struck, order a Commission
" to be sealed at the then next
" public Seal, in case there
" shall be a public Seal within
" seven Days next after such
" Docket shall be struck, or by
" a private Seal, within eight
" Days after the striking of
" such Docket, and shall not
" cause the same to be sealed
" accordingly, then, that any

" Person may beat Liberty to
" sue out a Commission with-
" out any Notice being given to
" the Person who shall first have
" applied for such Commis-
" sion."

(b) *Ex parte Evans.* 1 *Rose B. C.* 162.—In the Matter of *Lambert*, 1 *Rose B. C.* 258; 2 *Rose, B. C.* 323. And see the General Order, 13 April, 1816, confirming the General Order, 29th December, 1806, and providing for the Cases where several Applications are made at the same Time. 2 *Rose, B. C.* 477.

CASES IN BANKRUPTCY.

3

Ex parte CRUMP.—In the Matter of BELL.

MIC. TERM,
Nov. 9,
1816.

AT the Sittings after *Trinity* Term last, a Petition was presented in this Bankruptcy by a Person of the Name of *Powell*, to supersede the Commission on the Ground of Infancy; and the Order of *Supersedeas* was made upon the Affidavit of Service. The present Petition by the Assignees was to vacate that Order, and that a Writ of *Procedendo* might issue, stating, that it was their Intention to have resisted that Petition; that they instructed their Solicitor so to do; and that the Attorney watched the Paper of Petitions, both general and special, on the 27th and 28th of *August*, and found no such Petition there; and as it was understood that the Vice Chancellor would not sit beyond the 30th of *August*, and as there were Petitions more than enough to occupy the remaining Time the Court was expected to sit, the Solicitor concluded that the Petition had been abandoned.

The Vice Chancellor can certify the Propriety of awarding the Writ of *Procedendo* in Cases where a Commission has been superseded upon his Certificate.

In support of the Petition, Mr. *Cullen* and Mr. *Rose* contended, that although it might be right to dispose of other Petitions in Bankruptcy upon Affidavit of Service, yet, that a Petition to supersede a Commission differed from the common Case of Petitions; for as a Commission is for the benefit of all the Creditors, it cannot be superseded merely by the negligence of the Petitioning Creditor, or of the Assignees who might be acting collusively. That the Court would require to see the Proceedings in order to determine whether, upon the Face of them, the Requisites to the Validity of the Commission were apparent, and more particularly upon a Petition of *Supersedeas*, where the Vice Chancellor did not make his own

CASES IN BANKRUPTCY.

1816.

Ex parte
CRUMP.—
In the
Matter of
BELL.

Order, but certified to the Chancellor the Propriety of superseding the Commission, who, thereupon, affixed the Seal to the Writ of *Supersedeas*; and that by superseding the Commission upon Affidavit of Service, the Vice Chancellor placed the Parties in this Dilemma. They could not appeal, because, in fact, it was the Chancellor's Order. They could not have the Petition reheard, because it having been disposed of by Affidavit of Service, and not having been heard, it could not be reheard.

Sir *Samuel Romilly*, on the other Side, argued on the Mischief of not acting upon the Affidavit of Service, when Parties neglected to attend. He insisted, that if the *Supersedeas* could not be taken to be the Order of the Court, that, upon the same Principle, the Vice Chancellor could not award a *Procedendo*, which is equally a Writ under the Great Seal, to be operative upon a Commission that had been superseded by the Lord Chancellor, as that would be to revoke the Lord Chancellor's Order.

THE VICE CHANCELLOR

Thought public Convenience required that the Court should act upon Affidavit of Service in Cases of *Supersedeas*, as well as in all other Cases. That with respect to the Objection of awarding the Writ of *Procedendo*, if this were a *Supersedeas* which had proceeded upon a Petition heard before the Lord Chancellor, then, perhaps, the *Procedendo* ought not to issue, unless the Lord Chancellor himself should be satisfied of its Propriety; but here, as the Lord Chancellor in superseding acted upon the Order of the Vice Chancellor, in the same Manner might the Vice Chancellor certify the Propriety of awarding the *Procedendo*.

In this Case he was inclined to order the *Procedendo* to

CASES IN BANKRUPTCY.

5

issue upon Payment of the Costs occasioned by the former
Petition and Order, and of the present Application.

1816.

Ex parte
CRUMP.—
In the
Matter of
BELL.

To these Terms, however, the Petitioners preferred the
dismissing of their Petition, and it was accordingly dis-
missed.

NOWERS *v.* COLMAN.

MIC. TERM,
Nov. 23.
1816.

IN this Case a Reference to Arbitration had been made
a Rule of the Court of Chancery. The Defendant did not
perform the Award, and an Attachment issued against him,
under which he was in Custody. He was afterwards de-
clared a Bankrupt.

The Court will
not discharge
a certificated
Bankrupt out
of Custody
without giving
the Party, at
whose In-
stance the At-
tachment is-
sued, Time to
shew that the
Certificate was
fraudulently
obtained.

Mr. Bell, on the Ground that the Defendant had ob-
tained his Certificate, moved the Court, that he might be
discharged out of Custody in Pursuance of the Stat. 5 *Geo.*
2. c. 30. s. 13.

Mr. Seaton, on the other Side contended, that the
common Notice of Motion upon the Plaintiff's Clerk in
Court was not sufficient, or, if it were, that it ought to
have been served so as to allow a sufficient Time for the
Agent in Town to communicate with the Plaintiff who
resided in the Country.

The LORD CHANCELLOR.

The Certificate may have been obtained fraudulently,
and the Creditor ought to have an Opportunity of shewing
that to the Court (*a*).

(*a*) The 5 *Geo.* 2. c. 30. s. 13. “ who shall have obtained his or
enacts, “ That if any Bankrupt “ her Certificate from the acting

1816.

NOWERS
v.
COLMAN.

The Motion was ordered to stand over till the *Tuesday* following, when the Plaintiff would have had the Opportunity of returning an Answer to the Agent in Town.

" Commissioners, and such Certificate shall have been allowed
" and confirmed, as by this Act is directed, shall be taken in
" Execution or detained in Prison, on account of any Debts
" due or owing before he or she became bankrupt, by reason
" that Judgment was obtained before such Certificate was allowed and confirmed, it shall
" and may be lawful for any one or more of the Judges of the
" Court wherein Judgment has been so obtained against such
" Bankrupt, on such Bankrupt's producing his or her Certificate
" allowed and confirmed, to order any Sheriff or Sheriffs,
" Bailiff or Officer, Gaoler or Keeper of any Prison, who
" hath or shall have any such Bankrupt in his Custody by
" virtue of any such Execution, to discharge such Bankrupt
" out of Custody on such Execution, without Payment of
" any Fee or Reward; and the 7th Section directs that every
" such Bankrupt shall be discharged from all Debts by him,
" her, or them, due or owing at the Time that he, she, or they did become Bankrupts.
" And in case any such Bankrupt shall afterwards be arrested, prosecuted, or impleaded
" for any Debt due before such

" Time as he, she, or they became bankrupt, such Bankrupt shall be discharged upon
" common Bail, &c." A Bankrupt in Custody under an Attachment of the Court of Chancery for not paying a Sum of Money, the Order being made, and the Attachment executed previously to his Bankruptcy, having obtained his Certificate, was discharged upon Motion. *Wall v. Atkinson*, 2 *Rose, B. C.* 196.

Courts of Common Law will order a Certificated Bankrupt to be discharged upon Motion, but his Discharge may be opposed on the Ground of Fraud, or the Invalidity of the Certificate. As where the Commission described him of a Place in which he had never lived, and the Plaintiff had not heard of the Commission. *Sowley v. Jones*, *Blac.* 795; or if the Certificate has been fraudulently obtained, *Vincent v. Brady*, 2 *Hen. Black.* 1; or by an Allegation of gaming within the 12th Section of this Statute, *Lister v. Mundell*, 1 *Bos. & Pull.* 427. If the Validity of the Certificate is intended to be disputed at the Trial, it has been held, that the Court would not interfere in a summary Way. *Stacey v. Federici*, 2 *Bos. & Pull.* 390.

Ex parte BOLTON. } —In the Matter of MAC- MIC. TERM,
Ex parte SWANZY. } KENZIE. November
14 and 27.

THE Bankrupt, *William Mackenzie*, in the Year 1805, carried on trade at *Demarara*, in Partnership with *James Crawford Macleod*, *George Baillie*, and *John Jaffray*, under the Firm of *William Mackenzie and Co.*; and he also, at the same Time, carried on a distinct Trade at *Trinidad* in Partnership with the said *George Baillie*, *John Jaffray*, and one *James Rigby*, under the Firm of *Mackenzie, Rigby and Co.* *Baillie* and *Jaffray* also carried on a distinct Trade as Merchants in *London*, under the Firm of *George Baillie and Co.* In *October*, 1806, a Joint Commission issued against *George Baillie* and *John Jaffray*, under which they were declared Bankrupts. On the third of *February*, 1810, Messrs. *Swanzy and Co.*, Joint Creditors of *William Mackenzie and Co.*, took out a Separate Commission against *Macleod*; and on the 6th of *March*, 1810, they took out as such Joint Creditors a Separate Commission against *Mackenzie*. *John Bolton*, *John Bridge*, *Samuel Newton*, *Thomas Lumley*, *James Brade*, since deceased, and *James Swanzy*, one of the said Petitioning Creditors, were chosen the Assignees under each of these Separate Commissions.

A Joint Creditor sues out two Separate Commissions. Under one he proves against the Joint Estate, and receives a Dividend, at which Time he was ignorant of his Right to prove against the Separate Estate of the other.—*Held*, that he had not conclusively elected to prove as a Joint Creditor; but that refunding the Dividend with Interest, he might prove as a Separate Creditor.

On the 17th of *April*, 1807, an Order was obtained under the Commission against *Mackenzie*, for keeping distinct Accounts in respect of the several Co-partnerships of *William Mackenzie and Co.* and *Mackenzie, Rigby and Co.*

An Order was also obtained in *Macleod's* Bankruptcy, for keeping distinct Accounts. Under this last Order,

1816.
Ex parte
BOLTON.
Ex parte
SWANZY.—
 In the
 Matter of
MACKENZIE.

Messrs. *Swanzy* and Co. proved their Debt as a Joint Debt, and on the 5th *July*, 1814, received a Dividend. The Commissioners in *Mackenzie's* Bankruptcy, by their Warrant 6th *April*, 1816, declared, they conceived Messrs. *Swanzy* and Co. as the Petitioning Creditors were entitled to rank, and receive a Dividend out of the Separate Estate of the Bankrupt; this Determination of the Commissioners was disputed by the Assignees *Bolton*, *Bridge*, *Newton* and *Lumley*, who presented a Petition stating the above Facts, and praying that the Warrant of the 6th of *April*, 1816, might be discharged, and that it might be declared, that Messrs. *Swanzy* and Co. had elected to rank, and be considered as Joint Creditors of *William Mackenzie* and Co.; or if the Court should be of a contrary Opinion, then that they might be ordered to elect whether they would rank as Joint or Separate Creditors of *William Mackenzie* and Co.; and if they elected to rank as Separate Creditors, that they might be ordered to refund what they had received from the Joint Estate of *William Mackenzie* and Co. under *Macleod's* Bankruptcy.

Messrs. *Swanzy* and Co. stated upon Affidavit, that when they made their Proof under *Macleod's* Commission, and when they received the Dividend, they were ignorant of their Right to prove, if they thought fit, as the Separate Creditors of *Mackenzie*. They offered to refund the Dividend with Interest.

(a) This Petition was heard on the 24th *August*, 1816, when the Chancellor determined, that Messrs. *Swanzy* and Co. had a Right to elect and rank as Separate Creditors of *Mackenzie*, and to receive Dividends as such, upon their refunding the Sum received by them out of the Joint

(a) *Ex parte Bolton*, 2 *Rose*, B. C. 389.

CASES IN BANKRUPTCY.

9

Effects of *William Mackenzie* and Co. under *Macleod's* Commission.

1816.

Ex parte
BOLTON.

Ex parte
SWANZY.—
In the
Matter of
MACKENZIE.

Messrs. *Swanzy* and Co. having elected to rank as Separate Creditors of *Mackenzie*, applied to his Assignees for Payment of the Dividend upon their Debt, offering to refund what they had received from the Joint Estate of *William Mackenzie* and Co. with Interest; but the Assignees being about to apply for a Re-hearing of their Petition refused to pay it; whereupon Messrs. *Swanzy* and Co. presented their Petition, praying that the Assignees might be directed to pay to them the Dividend already declared, and all future Dividends to be thereafter declared upon the Amount of their Proof.

An Order having been obtained to re-hear the Petition of the Assignees, the Re-hearing, and the Petition presented by Messrs. *Swanzy* and Co. came on to be heard the same Day.

Mr. *Bell* and Mr. *Garratt* for the Assignees of *Mackenzie* contended, that Messrs. *Swanzy* and Co. by electing to rank as Joint Creditors under *Macleod's* Commission, and by receiving a Dividend, were precluded from taking a Dividend out of *Mackenzie's* Separate Estate, by Analogy to the Cases of Election under Wills. *Buttricke v. Broadhurst*, 1 Ves. j. 171. To those of Assignees electing to accept or reject a Lease. *Ex parte Nixon*. 1 Rose, B. C. 445. They also argued, that Messrs. *Swanzy* and Co., by proving against the Joint Estate, were in a similar Situation to a Creditor electing to prove under a Commission, whom the Court will restrain from proceeding at Law. *Ex parte Hardenberg*. 1 Rose, B. C. 204. That if a Mortgagee abandons his Security, being ignorant of its Value, yet nevertheless he is bound by such Election. *Ex parte Downes*, 1 Rose, B. C. 96. They

1816.

Ex parte
BOLTON.
Ex parte
SWANZY.—
 In the
 Matter of
MACKENZIE.

also relied upon the Case of *Ex parte Liddel, & Rose*,
B. C. 34. (a)

Sir Samuel Romilly, Mr. Beynon and Mr. Cullen for the Petitioners *Swanzy* and Co. contended, that none of the Cases cited came up to the present. That in *Ex parte Downes*, the Petitioner stated himself merely to be ignorant of the Value; but that here, there was an Ignorance of the Right to elect, and consequently during the Continuance of that Ignorance, there could be no Election. That under similar Circumstances, the Court was in the Habit of permitting a Party to withdraw his Proof, upon refunding the Dividends he had received, *Ex parte Rowlandson, 3 P. Williams, 405. Ex parte Bond and Hill, 1 Atk. 98. (b)*

THE LORD CHANCELLOR,

After reading the Prayers of both the Petitions: It has been argued on the Part of the Petitioner *Bolton*, that the other Petitioners, Messrs. *Swanzy* and Co. must be taken to have made a conclusive Election. This is a Case very

(a) The Lord Chancellor upon *Ex parte Liddel* being cited, said, In that Case *Keys* had sold Goods to *Groves* and Company, and he made his Proof for Goods sold and delivered, and received two Dividends; afterwards he wanted to prove upon the Bill. The Question was, whether, when he had said I will take the Bill as Waste Paper, he could afterwards be permitted to set it up. In that Case also, there was no Allegation of Ignorance of the Law. See also the S. C. cited *Ex parte Adam, 1 Ves. & Bea. 493.*

(b) *Ex parte Rowlandson, 3 P. Williams, 405. A. and B. Joint Traders* became bankrupt, and Joint and Separate Commissions were taken out against them. *A.*

and *B.*, before the Bankruptcies, were jointly and severally bound to *J. S. J. S. proved his Debt* under the Joint Commission, and received a Dividend; he petitioned to be admitted to prove under the Separate Commission. Lord *Talbot* held, that he should make his Election, but having received his Dividend whilst the Matter was in suspense, was not to bind him provided he refunded it, and that he should have a Month to make his Election. In *Ex parte Bond and Hill, 1 Atk. 98.*, Joint and Separate Commissions had issued against Partners. Creditors by joint and several Bonds who had received Dividends of the Joint Estate were allowed to elect, and had Time given for that Purpose.

CASES IN BANKRUPTCY.

11

special in its Circumstances, and I strongly felt at the Argument, that if they who decided *Ex parte Crispe*, 1 Atk. 134. had been aware of the Inconveniences that Decision would occasion, it would not have been so decided.

1816.
Ex parte
 BOLTON.
Ex parte
 SWANZY.—
 In the
 Matter of
 MACKENZIE.

It appears, that previous to 1805, *Mackenzie* carried on Trade in *Demarara* in Partnership, and also at the same Time in *Trinidad* with the same Partners, except *Macleod*, and with the Addition of a Person of the Name of *Rigby*. *Bailey* and *Jaffray* also carried on Business in Partnership together in *London*. Messrs. *Swanzy* and Co., Creditors of the *Demarara* House, having, as they might by the Authority of *Ex parte Crispe*, taken out a Separate Commission against *Macleod*, within little more than a Month take out a Separate Commission against *Mackenzie*. In both these Bankruptcies, Orders to keep distinct Accounts have been made. (Here the Chancellor read the Orders.) It is quite clear there ought not to have been such an Order in both Bankruptcies. That in *Mackenzie's* is the best adapted for arranging the Interests of all Parties, as it takes up the Consideration of what ought to be done in the *Trinidad*, as well as in the *Demarara* Partnership. It was necessary to have an Account of both the Partnerships; and as *Bailey* and *Jaffray* had been Partners, their Accounts ought also to be kept. This, therefore, was the proper Order, and that in *Macleod's* Bankruptcy was altogether impertinent, and when a Dividend of the Joint Estate was declared under that Order, it is evident the Division must have been made without any Reference to the respective Claims of the different Classes of Creditors.

It has been argued, that Messrs. *Swanzy* and Co., by proving and receiving a Dividend as Joint Creditors under the Order in *Macleod's* Bankruptcy, when as Petitioning

1816.

Ex parte
BOLTON.
Ex parte
SWANZY.—
 In the
 Matter of
MACKENZIE.

Creditors, they might have proved against the Separate Estate, must be taken to have made a deliberate and conclusive Election to rank as Joint Creditors of the *Demarrara* Partnership; and, therefore, they ought not to be permitted to prove against the Separate Estate of *Mackenzie*, although they are the Petitioning Creditors of his Commission. If a Creditor of *A.* and *B.* take out a Commission against *A.*, and he receives a Dividend under that Commission out of the Joint Estate, it has been ruled, (a) that he may bring an Action against the other Partner for the Residue. It is therefore perfectly clear, that if *Mackenzie* had not been a Bankrupt, Messrs. *Swanzy* and Co. might have maintained their Action against him for the Residue of the Debt. The Question then is, whether Messrs. *Swanzy* and Co. not having brought their Action against *Mackenzie*, but having thought fit to take out a Commission against him, they have done any Thing to preclude themselves from proving against his Separate Estate. It is contended, that they have so precluded themselves, by electing to take a Dividend under the Order in *Macleod's* Bankruptcy; but it is very difficult to extend the Doctrine of Election to a Case like the present, where a Party takes a Dividend out of the Joint Estate distributed under the Bankruptcy of one Partner, when, at the same Time, he is ignorant of his Right to prove against the Separate Estate of the other. I think the Order was right.

(a) *Heath v. Hall*, 4 Taunt. 326. *Young v. Hunter*, 16 East 252.

Ex parte WILLIAMS.—In the Matter of JOSEPH and HUGHES. HIL. TERM,
25th January,
1817.

HUGHES the Bankrupt traded as a Warehouseman, and being possessed of a considerable Stock, and having many Debts owing to him, he entered into a Partnership Agreement with *Joseph* the other Bankrupt, and by a Deed bearing Date the 8th of *March*, 1815, made between *Hughes* on the one Part and *Joseph* on the other, reciting, that whereas the said *William Hughes* was also indebted to sundry Persons in various Amounts, a Statement and Account whereof as near as the same could be made out was set forth in the Schedule thereunder written: and that it had been agreed between the said *William Hughes* and *Simeon Joseph*, that they should become equal Partners together in the said Trade and Business upon the Terms and Conditions therein after mentioned. And that upon the Treaty for the said Partnership it had been agreed, that all Debts so due, and owing by the said *William Hughes* as mentioned in the said Schedule, should be paid and discharged by the said Partnership, in Payment and Satisfaction whereof the said Stock in Trade and Debts so belonging to the said *William Hughes* should be transferred and made over by him, and had received and taken by the said Partnership in paying and satisfying the same; and no Claim or Demand whatsoever should be had or made on the said *William Hughes* in respect of the Payment of such Debts mentioned in the said Schedule; and it was further agreed, that the before-mentioned Stock in Trade and Debts belonging to the said *William Hughes* should immediately, after the signing thereof, be and become the Joint Property of the said Partnership, and should compose

A. a Trader being indebted to several Persons, enters into Partnership with *B.*, and brings his Stock in Trade into the Partnership. By the Partnership Articles it was agreed, that the Joint Trade should pay the Creditors of *A.* named in a Schedule.—*Held*, that a Separate Creditor of *A.* named in the Schedule, did not by the Articles become a Joint Creditor of *A.* and *B.*

1816.
~~the said~~
Ex parte
 WILLIAMS.
 —In the
 Matter of
 JOSEPH
 and
 HUGHES.

the said Partnership Stock. And it was also agreed by and between the said Parties thereto, that the said Joint Trade should pay and advance from Time to Time such Sums of Money as might be required for the Purpose of paying and satisfying the Debts and Demands due and owing from the said *William Hughes*, as mentioned in the said Schedule.

Hughes and *Joseph* entered into Partnership upon the Terms mentioned in the Agreement, and in pursuance thereof, many of the Creditors of *Hughes*, whose Debts were scheduled, were paid by the Partnership.

On the 5th of *December*, 1816, a Joint Commission issued against *Hughes* and *Joseph*, under which they were declared Bankrupts. The Petitioner was one of the scheduled Creditors of *Hughes*, whose Debt had not been paid. The Petition prayed a Declaration, that the scheduled Creditors were Joint Creditors of *Hughes* and *Joseph*, and that as such they might be permitted to prove their Debts, and receive a Dividend out of the Joint Estate.

Mr. *Leach* and Mr. *Cullen* for the Petition contended, that by virtue of the Partnership Deed, the Creditors of *Hughes*, named in the Schedule, acquired a Right to prove against the Joint Estate on the Ground of Contract; and that it was not necessary to shew an Assent on the Part of a Creditor to the Arrangement made by the Bankrupts. *Ex parte Clowes*, 1 *Cooke*, B. L. 264. That Lord *Thurlow* held the slightest Acts done by a Partnership would operate as the Adoption of the Debt of one of the Partners. *Ex parte Jackson*, 1 *Ves. j.* 181.

Mr. *Wilson* for *Hughes* the Bankrupt and his Separate Creditors, argued that the scheduled Creditors had a specific Demand against the Funds of *Hughes* taken into the

Partnership; and as these Funds were to be distributed under the Joint Commission, they ought to prove against the Joint Estate.

1817.
—
Ex parte
WILLIAMS.
—In the
Matter of
JOSEPH
and
HUGHES.

Sir *Samuel Romilly* and Mr. *Hart* on the other Side contended, that unless a scheduled Creditor of *Hughes* made it appear to the Court, that he had, in some Way or other, been a Party to the Agreement between *Hughes* and *Joseph*, he ought not to be permitted to prove against the Joint Estate; for such Proof could only be admitted on the Ground that the Creditor could have called upon the Partnership for Payment of his Debt before the Bankruptcy; but neither at Law, nor in Equity, could such a Demand have been enforced without the Creditor first shewing an Assent to the Agreement.

The LORD CHANCELLOR.

If it is meant to be said on the Part of the Petitioner, that a Joint Action might have been maintained by the Creditors named in the Schedule against *Hughes* and *Joseph* immediately upon the Execution of the Deed, and by force of that Deed only, independent of any Accession to the Agreement on the Part of the Creditors named in the Schedule—I cannot assent to that Doctrine. There are some old Cases upon this Subject, and in one of them (reported I think by *Levinz*, or by some of the Reporters of his Time) where *A.* by Deed covenanted with *B.* a Party to it, that he, *A.*, would pay a Sum of Money to *C.*, a Stranger to the Deed. *C.* attempted to maintain an Action on the Covenant against *A.* (a). Whatever might then

(a) The Case alluded to by the Lord Chancellor seems to be *Gilby v. Copley*, 3 Lev. 138, where *Levinz*, J. differed in Opinion from the other Judges, and shewed the Distinction between a Deed made *inter partes*, and one beginning in the first Person, "Know ye that I, &c." and that if a Deed be made between Parties, a Stranger cannot sue a Party upon the Deed for any

1817.

Ex parte
WILLIAMS.
 —In the
 Matter of
JOSEPH
 and
HUGHES.

have been the Law, such an Action certainly could not now be supported. But I agree to the Proposition, that a very little will do to make out an Assent to the Agreement. If any of the Creditors named in the Schedule think they can make out such a Case, they may apply on that Ground to prove their Debts against the Joint Estate.

Thing contracted to be done for his Benefit, but otherwise, if the Deed were in the first Person. See *Scudamore's Case*, 2 *Inst.* 673. *Salter v. Kidgley*, *Carth.* 76. *Cooker v. Child*, 2 *Lev.* 74. *Co. Litt.* 52. 6 b.

As to Contracts not under Seal, *Buller*, J. is reported to have said, "Independent of the Rules which prevail in mercantile Transactions, if one Person makes a Promise to another for the Benefit of a third, that third Person may maintain an Action upon it." *Marchington v. Vernon*, 1 *Bos. & Pull.* 101. (n. a.). See *Cont. Bourne v. Mason*, 1 *Vent.* 6. *Crow v. Rogers*, 1 *Stra.* 592. *Bull. L. N. P.* 134. Where a Parent has contracted with a Party for a Benefit to his Child, it has been determined that the Child may maintain an Action on the Promise made to the Parent. *Dutton v.*

Poole, 2 *Lev.* 210. *T. Raym.* 302. *Bull. L. N. P.* 134. *Rockwood v. Rockwood*, 1 *Leon.* 192. But these were Cases in which the Party might have been called upon to account in a Court of Equity, either on the Ground of Trust or Fraud. *Chamberlaine v. Chamberlaine*, 2 *Freem.* 34. *Reech v. Kennegal*. 1 *Ves.* 123. *Amb.* 67. *Harris v. Herwell*, *Gilb. Rep.* 11. *Leister v. Foxcroft*, there cited. And *Eyre*, Ch. J. commenting upon the Case of *Marchington v. Vernon*, says, "As to the Case put at the Bar of a Promise to A. for the Benefit of B., and an Action brought by B., there the Promise must be laid as being made to B., and the Promise actually made to A. may be given in evidence to support the Declaration." 1 *Bos. & Pull.* 102.

Ex parte HARRISON.—In the Matter of ———. **HIL. TERM**
1817.

THIS Petition, which was presented by the Assignees, A commis-
prayed that they might be at Liberty to complete the sioner, though
Sale of the Bankrupt's Estate that had been sold by he may not
Auction to a Gentleman, who was one of the Commis- have acted,
sioners named in the Commission, but who had not cannot be-
acted. The Terms of the Sale were stated to be very come a pur-
beneficial for the Estate, and the Application was made chaser of the
with the Consent and at the Desire of the Creditors; bankrupt's
estate without
but it did not appear how such alledged Consent had the consent of
been obtained. the creditors
at a general
meeting.

Mr. *Horne* for the Petition.

The LORD CHANCELLOR.

I cannot make an Order of this Nature, unless a ge-
neral Meeting of the Creditors has been called for the
Purpose of their assenting to the Sale to this Gentleman.

Ex parte TREACHER.—In the Matter of ———. **LINCOLNS**
INN HALL,
Feb. 19,
1817.

MR. *Cooke* moved, that the Chancellor would be A person hav-
pleased to answer a Petition for an early Day; also sug- ing a deed in
gesting that probably the Chancellor would make the his possession,
Order at once. The Order prayed was, that a Person that in effect
who had a Deed in his Possession, which, in Effect, amounted to
amounted to an Act of Bankruptcy by one of the Par- an act of ban-
ties thereto, might attend with it before the Commis- kruptcy by one
sioners, or otherwise, that the Commission might be of the parties,
opened upon it. was ordered to
attend the
commissioners
with it, with-
out prejudice
to any objec-
tion being ta-

ken before them as to disclosure of confidential communications.

1817.

The LORD CHANCELLOR

Ex parte
TREACHER.
—In the
Matter of
—

Expressed his Unwillingness to conclude the Person from taking any Objection he might have to disclose any Circumstances relating to the deed, or to any confidential Communication, but ordered that he should attend the Commissioners, carrying with him the Deed, without Prejudice to any Objection he might make before them.



MIC. TERM, 1816. *Ex parte* DU CANE.—In the Matter of —.

Mortgages of premises to be sold under the general order, permitted to bid at the sale.

THIS was a Petition by a Mortgagee, who had come in under the General Order, 8th *March*, 1794, that he might be permitted to bid at the Sale for the Purchase of the mortgaged Premises.

It was contended on Behalf of the Petition, by Mr. *Hart*, that Orders of the Nature prayed were made every Day, as they were manifestly for the Benefit of the Bankrupt's Estate, and prevented the Property from being sold at an under Value.

Mr. *Roots* opposed the Petition, upon the Ground that the Court would not suffer a Party who was, in Fact, the Vendor of the Property to become the Purchaser because, as such, he would have an Interest in depreciating its Value.

The VICE CHANCELLOR.

In all these Cases, where it is necessary to apply to the Court for Leave to become a Purchaser, there must be the Possibility of some conflicting Interest, otherwise the Application would be unnecessary.

The Order was made.

Ex parte BRINE.
Ex parte WILLIAM and JOSEPH } —In the Matter LINCOLN'S
 PARSONS. of BUDGETT. INN HALL,
 Jan. 14,
 1817.

ON the 9th of *October*, 1816, the Petitioners, *William* and *Joseph Parsons*, struck a Docket against the Bankrupt, and the Commission issued on the 25th of *October*, but was not opened. On the 4th of *November* the Petitioner, *Brine*, on behalf, and as a friend of the Bankrupt, requested the Petitioners, *William* and *Joseph Parsons*, to accept of a Composition in respect of their Debt, which they refused to do. On the 6th of *November*, *Brine* made another Application to *Joseph Parsons*, stating, that he was prepared to pay the Debt and the Costs of the Commission, and that he had the Money in his Pocket for that Purpose. Upon which *Joseph Parsons* referred him to his Solicitor, who agreed to receive the Debt and Costs from *Brine* on the 8th of *November*. On the 7th of *November* the Bankrupt, accompanied by Mr. *Baynton*, one of his principal Creditors, called upon *Joseph Parsons*, and told him that *Brine* had an Engagement on the 8th of *November*, and would not be able to wait upon his Solicitor as had been proposed, and at the same Time requested *Joseph Parsons* then to receive the Debt and Costs. *Joseph Parsons* assented to this Proposal, and the Bankrupt then paid to him, in the Presence of *Baynton*, £260. being the Amount of the Debt and taxed Costs, including also 20 Guineas towards the Expences of the Commission.

The Commission of a Petitioning Creditor, who, with the Knowledge of two or three of the Creditors, received his Debt from the Bankrupt, superseded under the Stat. 5 Geo. 2. c. 30. s. 24. at the Petition of a Creditor privy to the Transaction. Whether that Creditor will be permitted to sue out a new Commission.—
Quære.

On the 11th of *November*, *Brine* presented a Petition to the Lord Chancellor, praying that the Commission might be superseded, at the Costs of *William* and *Joseph*

1817.
 {
Ex parte
 BRINE.
Ex parte
 WILLIAM
 and
 JOSEPH
 PARSONS.—
 In the
 Matter of
 BUDGETT.

Parsons, and that the Petitioner, *Brine*, might be at Liberty to sue out another Commission against the Bankrupt, and that *William* and *Joseph Parsons* might be ordered to refund the Debt and Costs for the Benefit of the Creditors, together with the Costs of the Application. *William* and *Joseph Parsons* filed a Cross-Petition, praying that *Brine's* might be dismissed with Costs, and that they might be permitted to pay the Debt and Costs received by them into Court, and that they might proceed immediately in the Execution of the Commission already issued against the Bankrupt.

These Petitions came on to be heard together.

Mr. *Hart* and Mr. *Montagu*, for *William* and *Joseph Parsons*. The Circumstances under which the Petitioning Creditors have been paid their Debt, take the Case out of the Operation of the Statute 5 *Geo. 2. c. 30. s. 24.* For the Mischief intended to be provided for by that Section of the Statute was the private Payment or Satisfaction of the Petitioning Creditor's Debt, whereas here, the Payment was made publicly, and at the Instance, and with the Consent of many of the Bankrupt's Creditors. Here there was not any Extortion, as the Petitioning Creditors received the Debt under the Impression that the Estate would be amply sufficient to pay all the Debts; and, at all Events, *Brine*, implicated as he was in the Transaction, could not supersede the Commission. *Kirk, ex parte, 15 Ves. 464. Thomas v. Rhodes, 3 Taunt. 478.*

Sir *Samuel Romilly* and Mr. *Rose*, on the other Side argued, that the Word "privately" is used in the Act as distinguished from Payments made with the Knowledge and Concurrence of all the Creditors. *Parson, ex parte, 15 Ves. 461.*

That it did not appear by the Affidavits that *Brine* had any Knowledge of the legal Effect of the Transaction in which he engaged, and that he himself had positively sworn to the contrary. But, admitting that he was fully aware of the legal Effect of paying the Petitioning Creditor's Debt, and that he engaged in the Transaction with a premeditated Design to overturn the Commission that had issued; yet, they contended this was one of the Cases in which the Policy of the Law allowed the Complaint to be made by a *Particeps Criminis*, as the Mischief and Prejudice to all the Creditors of the Bankrupt was the true Ground for the Relief given by the Act, which declared that all the Creditors should be on an equal Footing, and not one to be preferred or paid more than the others.

1817.
Ex parte
BRINE.
Ex parte
 WILLIAM
 and
 JOSEPH
 PARSONS.—
 In the
 Matter of
 BUDGETT

The LORD CHANCELLOR,
 (After reading the Section) (*a*). I am obliged to suppose

(*a*) 5 Geo. 2. c. 30. s. 24. " Authority aforesaid, That if
 " And whereas Commissions of " any Bankrupt or Bankrupts
 " Bankrupts are frequently taken " shall after issuing of any Com-
 " out by Persons who, by Means " mission against him, her, or
 " of such Commissions (on a " them, pay to the Person or
 " Composition proposed by the " Persons who sued out the
 " Bankrupts) and on Promise " same, or otherwise give or
 " not to execute the same, pre- " deliver to such Person or Per-
 " vail with and extort from the " sons Goods or any other Sa-
 " Bankrupts their whole Debts, " tisfaction or Security for his,
 " or much greater Part thereof, " her, or their Debt, whereby
 " than such Bankrupts pay to " such Person or Persons, suing
 " their Creditors, or otherwise " out such Commission, shall
 " get from such Bankrupts, " privately have and receive more
 " Goods, or other real or personal " in the Pound in respect of his,
 " Security, which is contrary to " her, or their Debt, than the
 " the true Intent and Meaning " other Creditors, such Pay-
 " of the several Statutes made " ment of Money, Delivery of
 " concerning Bankrupts, which " Goods, or giving greater
 " said Statutes intend that all " or other Security or Satis-
 " such Bankrupt's Creditors shall " faction, shall be deemed and
 " be on equal Foot, and not " taken to be such an Act of
 " one preferred before another, " Bankruptcy, whereby, on
 " or paid more than another in " good Proof thereof, such Com-
 " respect of his or her Debt: be " mission shall and may be su-
 " it therefore enacted by the " perseded; and it shall be law-

LINCOLN'S
INN HALL,
Feb. 27,
1817.

Ex parte HARDING.—In the Matter of HUNT.

The Solicitor to a Commission restrained by Injunction from negotiating a Promissory Note that he had received from the Bankrupt for his Bill of Costs in procuring his Certificate, the Bankrupt having purchased the Debts of many of the Creditors, and the Solicitor being indebted to the Estate in such a Sum, that the Share of it coming to the Bankrupt standing in the Place of the Creditors, in respect of the Debts so purchased by him, would exceed the Amount of the Promissory Note.

THIS Petition, verified by Affidavits, was presented by the Assignees and by the Bankrupt, stating that the Solicitor to the Commission had been employed to collect the Debts due to the Bankrupt's Estate, and that, upon a Petition presented by the Assignees on the 25th of *June*, 1816, it was ordered that he should account for all the Monies received by him; that he should deliver his Bill, and that it should be taxed. And further stating, that the Petitioner, the Bankrupt, had obtained his Certificate, and had applied such Funds as he could procure in Payment of several of his Creditors. That he had employed the Solicitor to the Commission in obtaining his Certificate; who, being irritated at the Order of the 25th *June*, 1816, threatened to commence Actions against the Bankrupt, unless he gave him a Note of Hand for the Amount of his Bill; and in Consequence of such Threats, he gave the Solicitor a Promissory Note for £370, payable in Four Months. And further, stating that the Solicitor neglected to bring in his Bill, and evaded coming to an Account. That he was indebted to the Petitioners, the Assignees, in a very large Sum, of which the Proportion that would be forthcoming to the Bankrupt, in respect of the Creditors he had paid, would exceed the Sum of £370; and, that the Assignees, with the Concurrence of many of the principal Creditors, were willing to allow the Solicitor Credit for the Sum of £370, and to suffer him to retain it out of the Balance due from him to the Estate. And after stating that the Solicitor had commenced an Action against the Petitioner, the Bankrupt, and that he threatened to negotiate the Note, the

Petition prayed, that he might be restrained from negotiating the Note, and from prosecuting the Action, and that the Note might be delivered up, he having Credit given for the Amount in his Account.

1817.
Ex parte
HARDING.—
In the
Matter of
HUNT.

Mr. *Leach* and Mr. *Rose* this Day moved, *Ex parte*, for an Injunction to restrain the Negotiation of the Note.

The LORD CHANCELLOR

Made the Order.

Ex parte WHEELER.—In the Matter of MALLAM.

LINCOLN'S
INN HALL,
March 1,
1817.

THOMAS *Boyn Mallam*, the Bankrupt, and *William Bradford*, in the Year 1815, were Partners in the Trade of *British* Wine and foreign Spirit Merchants; and on the 1st of *December*, 1815, a Separate Commission issued against *Mallam*, under which he was declared a Bankrupt, and an Assignment was made by the Commissioners of his Estate and Effects. On the 14th of *December*, 1815, a Joint Commission issued against *Mallam* and *Bradford*, and they were declared Bankrupts, and the Petitioner was chosen the Assignee under that Commission. The Petitioner, in *Hilary* Term, 1816, presented his Petition, stating that the Assignees under the Separate Commission had possessed themselves of the Partnership Books of Account, and of a considerable Part of the Joint Estate, and praying that the Separate Commission might be superseded, with the usual Directions. When this Petition came on to be heard, it to be an executory Agreement; and the Father refusing to become Security, the Partnership Stock, &c. was not thereby transferred to the continuing Partner.

A retiring Partner, by an Agreement in Writing, assigns and sells all the Stock, Debts, &c. to the continuing Partner, who agrees to pay a Debt owing by the retiring Partner, and also to pay him an Annuity of 100*l.* *per Annum*, for the due Payment of which the Agreement recited that the Father of the continuing Partner, who was not a Party thereto, would be Security.—*Held*,

1817.
Ex parte
WHEELER.—
 In the
 Matter of
MALLAM.

“*jamin James*, and other Bills for which Goods have
 “ been actually and *bonâ fide* received in the Joint Trade,
 “ that the said *Thomas Boyn Mallam*, then, and under
 “ such Circumstances, may detain from the said An-
 “ nuity, or otherwise, such an Amount as is equal to the
 “ one to which, by such Acceptance, the said *Thomas*
 “ *Boyn Mallam* is made liable; and moreover, if the
 “ said *William Bradford* has received any of his old
 “ Debts since the 16th of *October* last past, and to the
 “ Amount of three Pounds, then, and in such Case, the
 “ same may be deducted by *Thomas Boyn Mallam* in the
 “ same Manner as before-mentioned, or if he should here-
 “ after receive any of the Debts aforesaid. Now, if after
 “ the due signing hereof by *William Bradford* and *Tho-*
 “ *mas Boyn Mallam* aforesaid, either of the same Parties
 “ refuse to agree to either of the Clauses composing and
 “ contained in these Articles, then the Party so offend-
 “ ing, shall forfeit to the other Party the Sum of £500.,
 “ as though the same was a just Debt contracted by, in,
 “ and through the regular Course of Trade.—As Witness
 “ our Hands and Seals, this 2d Day of *November*, 1815.”
 This Agreement is signed by *Mallam* and *Bradford*,
 and I observe it is witnessed by *Mallam's* Father, and
 by *Wort*, who was examined before the Commissioners.
 Now, the first Question is, whether this is an actual legal
 Assignment or an executory Agreement; because if it is
 only an executory Agreement, Circumstances have oc-
 curred, as appears by the Evidence, that may have the
 Effect of putting an End to it. I think it is to be col-
 lected from the Agreement, that the Father was to join
 in being Security for Payment by the Son, and that such
 was the Impression upon *Wort's* Mind, who witnessed
 the Execution of the Agreement, appears by his Evi-
 dence. But *Mallam's* Father refused to give such Se-
 curity; therefore, that further Act which was necessary to

be done in order to complete the Transfer of the Property, did not happen before the Bankruptcy. The Question of Tort therefore does not arise (a). It then comes to this, has this Property been so placed in the Ordering and Disposition of *Mallam* before his Bankruptcy, as to bring it within the Intent and Meaning of the Statute (b)? For this Purpose the separate Creditors of *Mallam* rely upon the Notice in the *Gazette*, and the circular Notices sent to the Persons indebted to the Partnership. It appears that on the 6th of *November*, 1815, the following Notice was inserted in the *Gazette*: "Know all Men that we, *William Bradford* and *Thomas Boyn Mallam*, of 62, *Blackman-street*, *British Wine Merchants*, do hereby mutually agree to dissolve Partnership; and all the Debts due from the said Co-partnership are to be paid by the said *Thomas Boyn Mallam*; and also all Debts due unto the said Co-partnership are to be received and paid unto the said *Thomas Boyn Mallam*.—As Witness our Hands and Seals." In Addition to this General Notice, there were circular Letters (c) sent to some, but not to all of

1817.

Ex parte
WHEELER.—
In the
Matter of
MALLAM.

(a) *Bradford*, previous to the Agreement, had lived in the upper Part of the House, and the under Part was used for the Purpose of the Trade; after the Agreement, he refused to give up Possession, and continued to live there till after *Mallam's* Bankruptcy. It had been argued that this was an adverse Possession in *Bradford*.

(b) 21 Jac. 1. c. 19.

(c) These circular Letters were of two Descriptions, as follow: "Sir or Madam, Having purchased the Whole of *Mr. Bradford's* Interest in the Concern lately carried on between us in Partnership, and having at this present considerable Engagements to make good, I should be ex-

ceedingly obliged for a Settlement of your Account, which will considerably assist me. Your future Favours will be thankfully received, and punctually attended to by, Sir, your very obedient Servant, *Thos. B. Mallam*."—"Sir, The Partnership lately existing between myself and *Mr. Bradford* being dissolved, and notified in the *London Gazette*, and all *Mr. B's* Interest in the Concern having become mine, I must beg the immediate Payment of your Account. Those Debts remaining unpaid will, at an early Period, be placed in the Hands of my Attorney to recover the same. I am, Sir, your most obedient Servant, *Thos. B. Mallam*."

1817.
Ex parte
 WHEELER.—
 In the
 Matter of
 MALLAM.

the Persons who were indebted to the Partnership; but if the Effect of the Notice in the *Gazette* is not sufficient to put the Partnership Property in the Order and Disposition of *Mallam*, according to the Statute, these circular Notices cannot affect Property in the Hands of those who never received them. As to the Operation of the Notice in the *Gazette* (without adverting to the Difficulty of construing it to be Notice to those who have not been proved ever to have seen it), how can it be said to put the Partnership Effects in the Ordering of *Mallam*, when, by the Terms of the Notice, the Hand which is to receive the Partnership Debts, is the very Hand to apply them in Satisfaction of the Demands against the Partnership? As to the Lease and Fixtures, no Assignment has been made of them, and *Bradford* remained in the House at the Time of the Bankruptcy. With respect to the Stock in Hand, it is in Evidence, that the Permits for the Stock sold by *Mallam* after the Execution of the Agreement, were made out in *Bradford's* Name, which Circumstance alone is very strong to shew that the Ordering and Disposition of the Stock, according to the Statute, was not in *Mallam* alone. I think therefore, in the first Place, that the Agreement did not operate to transfer the Partnership Property to *Mallam*, so as to raise a Question of Tort. Secondly, that the Property never was solely in the Ordering and Disposition of *Mallam*, or if ever it were out of the Ordering and Disposition of *Bradford*, it was restored to him before the Bankruptcy of *Mallam* (a).

Commission superseded.

(a) It appeared by the Evidence that *Bradford*, before the Bankruptcy, and in Consequence of *Mallam's* Father refusing to become Security for his Son, ac-

cording to the Agreement, had put Padlocks upon some of the Doors of the Places containing the Stock in Trade.

Ex parte DAVISON.—In the Matter of SEATON.

LINCOLN'S
INN HALL,
March 31,
1817.

THIS was one of the Cases arising out of the Bankruptcy of the *Pontefract* Bank. The Petition prayed that the Proof of a Debt made by *Heptonstall*, one of the Holders of the Notes (a) issued by that Bank, might be expunged.

The Holder of Promissory Notes, payable in Cash or Bank of England Notes, who did not receive them immediately from the Maker,—*Held*, not entitled to prove the Amount as for Money had and received against the Estate of the Maker.

The Proof had been made for Money had and received, and the Holder of the Notes, who was a Farmer, by his Affidavit stated, that he received them in the usual Course of his Business.

It was argued, on Behalf of the Petition, by Mr. *Bell* and Mr. *Barber*, that the Case determined by the Court of King's Bench in *Ex parte Imeson*, 2 *Rose*, B. C. 225, was conclusive of the Question.

Mr. *Cooke*, on the other Side, contended, there was a marked Distinction between that Case and this. In *Ex parte Imeson*, *Beckett* had made his Proof upon the Notes; but here the Holder had proved for Money had and received. And he insisted upon two Points; first, that the Holder could have maintained an Action in his own Name against the *Pontefract* Bank for Money had and received, *Grant v. Vaughan*, 3 *Burr. Rep.* 1516; or if not, yet the Holder had an Equity to call upon the Persons to whom the Bank had originally delivered the Notes

(a) See the Form of these Notes, 2 *Rose*, B. C. 225.

1817.

Ex parte
DAVISON.—
 In the
 Matter of
SEATON.

to prove for him as a Trustee, under the Authority of those Cases where the Court, upon Petition of the Surety who had paid the Debt, and without putting him to the Expense of filing his Bill, had, previous to the Act, 49 Geo. 3, been accustomed to order the Obligee to prove the Bond as a Trustee for the Surety under the Commission of the principal Obligor; and that the Court would not direct the Proof to be expunged without an Inquiry whether the Holder was in a Situation to call for such Proof to be made on his behalf.

The LORD CHANCELLOR.

It appears the *Pontefract* Bank sent out into the World an immense Issue of Notes, originally good for nothing. *Heptonstall*, in the usual Course of his Dealings, receives some of these Notes, for which he is represented to have given the full nominal Value; but it does not appear from whom he received them, nor what he gave for them: it might be Money, or it might be Goods. Admitting that I could supply the Consideration between the Holder and the Party from whom he took these Notes, how can I say the Bankers received Money from the Persons to whom they delivered them? If *A.* goes to the Bank and receives a Note, for which he does not give any Money, and they debit him with the Amount of the Note, no second Person to whom *A.* might pay it, could maintain an Action for Money had and received against the Bank. There is also a material Distinction between that Case cited from *Burrows* and the present. There the Delivery of the Note was an Assignment of the Debt, but here the Notes have been determined not to be negotiable (*a*). If Mr. *Heptonstall* had sold a Sack of Corn for one of these Notes to a Person who had given five Guineas for it at the Bank, there would be no Contract that

(a) *Ex parte Imeson*, 2 Rose, B. C. 225.

could give him a right of action against the bankers. (a) He must bring his action for goods sold and delivered against the purchaser, who might have an action against the bankers for money had and received. But for the purposes of this petition, it is quite sufficient to say, that it does not appear that such an action could be maintained against the bank upon any one of these notes.

1817.

Ex parte
DAVISON.—
In the
Matter of
SEATON.

It is then argued, admitting this proof cannot stand as now made, yet that the court will not expunge it if it sees that the holder of the notes is entitled as a *cestuique* trust to call upon the persons to whom the notes were delivered to prove for him. But the difficulty is, whether the relation of trustee and *cestuique* trust subsists, and whether the persons who would be trustees have a right of action.

Proof ordered to be expunged.

(a) As to the necessity for the plaintiff in an action for money had and received to his use, to shew an assent on the part of the defendant to such appropriation of the money, see Lord *Ellenborough's* judgment, *Williams v. Everett*, 14 *East*, 582. And also see the remarks of *Eyre, C.*

J. n. a. to *Ex parte Williams*, ante, 16. Where the assent is expressed see *Ward v. Sir Stephen Evans* 2. Lord *Raymond*, 928. *Fenner v. Mears*, 2 *Black*, 1269. *Israel v. Douglas*, 1 *H. Black*, 239, or implied, *De Bernales v. Fuller*, 14 *East*, 590.

LINCOLN'S
INN HALL.
April 2,
1817.

Ex parte FARENDEN.—In the Matter of
FARENDEN.

A. purchases coals of *B.*, and agrees to give him a bill of exchange for part of the purchase money payable at two months. Afterwards *A.* sends to *B.* a paper, purporting to be a bill accepted by him with a blank left for the name of *B.* as the drawer. *B.* keeps the paper but does not fill up the blank till after he had sued out a commission against *A.*—*Held*, that the bill did not constitute a valid petitioning creditor's debt; and that *B.* having elected to keep the bill, could not prove his debt as petitioning creditor for goods sold and delivered.

THIS was the petition of the bankrupt, praying that the commission might be superseded.

It appeared by the affidavits that the bankrupt in *January* last bought of *Smith*, the petitioning creditor, a cargo of coals. Part of the purchase money was to be paid immediately to cover the duty, and the bankrupt was to have two months credit for the remainder, to be secured by a bill at two months date. When the coals were delivered, the bankrupt paid £39. at the Custom-house on account of the duty, and there remained £221 due to *Smith* for the residue of the purchase money.

On the 23d *January* the bankrupt inclosed in a letter to *Smith* a bill of exchange, dated the 25th of *January*, payable at two months after date, for the sum of £221 accepted by the bankrupt, and having a blank left for the signature of *Smith* as the drawer. This bill not being such as was stipulated to be given, *Smith* consulted with his attorney, whether he should take it in satisfaction of his debt for the cargo of coals, and upon his advice decided to take it. Soon after, having discovered that *Farenden* was in embarrassed circumstances, he determined to sue out a commission of bankrupt against him, which he did upon the usual affidavit. (a). The

(a) The affidavit was as follows: "*Joseph Smith*, &c. maketh oath that *James Farenden*, &c. is now justly and truly indebted to him, this

"deponent, in the sum of £100 and upwards, for coals sold and delivered by him, this deponent, to and for the use of the said *James Farenden*."

commission issued on the 28th of *January*, 1817. Afterwards *Smith* signed, when he appeared before the acting commissioners to prove his debt, the bill of exchange at their suggestion.

1817.
Ex parte
FARENDEN
—In the
Matter of
FARENDEN.

Mr. *Cooke* and Mr. *Heald* for the petition contended that the bill was merely waste paper, and that there was not a good petitioning creditor's debt to support the commission.

Mr. *Montagu* on the other side, argued, if a purchaser of goods agrees to pay for them by a good Bill of a particular description, and neglects so to do, then he may be sued at law for goods sold and delivered.

That a petitioning creditor may make the common affidavit; and if the debt turns out to be different from that stated in the affidavit, yet it will support the commission. *Bryant v. Withers*, 2 *Rose*, B. C. 8.

The LORD CHANCELLOR.

This cargo of coals was sold to be paid for on credit. It is now settled, though it has been settled and unsettled more than once, that a debt to be paid at a future day is not a good petitioning creditor's debt.^(a) But it is argued, that this was an agreement to pay at a future day in a particular manner, and that the purchaser having failed to perform his part of the agreement by sending a bill of a different description from that which the seller stipulated for at the time of the sale, an action might have been maintained for goods

"*den*, and at his request; "satisfaction whatsoever," &c.
"for which said sum of £100, (a) See the cases collected
"or any part thereof, he, in Lord *Ellenborough's* judgment,
"this deponent, hath not *Hoskins v. Duperoy*,
"received any security or 9 *East*. 496.

1817. sold and delivered. But let us see what the facts of the case are? *Farenden* sends the paper to *Smith*, who was fully authorized, if he thought fit, to put his name to it as the drawer, and *Farenden* would have been concluded from ever saying it was not his acceptance; or he might have returned it, and brought his action for goods sold and delivered. Upon receiving the paper, *Smith* consults with his attorney, and by his advice, determines to keep it; thus giving his sanction to a change in the contract. A few hours after, he discovers that *Farenden* was drawing and redrawing bills, and that his circumstances were very doubtful; he then sues out a commission upon an affidavit for goods sold and delivered. When he comes before the commissioners, he is told, that having agreed to take the bill, he cannot prove for goods sold and delivered, and that he could not prove upon the bill, unless the drawer's name appeared upon it. He then fills up the bill: but this paper did not exist as a bill when the commission issued and therefore cannot support it. Then Mr. *Montagu* is driven to argue, (a) that the paper is such a contract in writing, to pay at a future day, as will support the commission; but the answer to that is, either the paper is a bill of exchange, or it is nothing.

Commission superseded.

(a) Under the stat. 5 Geo. 2. c. 30. s. 22, repealing the 7th Geo. 1. c. 31. s. 3. Lord *Ellenborough*, in *Hoskins v. Duperoy*, 9 East. 498, remarks, that the words, "promise or agreement for the same," contained in the 7 Geo. 1. are omitted in the 5 Geo. 2.

Ex parte HARDING.—In the Matter of HUNT. LINCOLN'S
INN HALL,
April 2,
1817.

AN injunction having been obtained (a) in this case to restrain the negotiation of the note, the petition came on to be heard.

Mr. *Leach* and Mr. *Rose* for the petition.

Mr. *Dowdeswell* for the solicitor contended, that the bankrupt had not an equity to have the action restrained, and that if the relief had been sought by bill, a demurrer would have lain to it.

The LORD CHANCELLOR.

This gentleman is in fact the solicitor for all parties, and, amongst the rest for the bankrupt, who stands in the place of the creditors whose demands he has satisfied. I shall have no difficulty in restraining the action.

to the bankrupt standing in the place of the creditors in respect purchased by him, would exceed the amount of the promissory note.

The solicitor to a commission, restrained by injunction from proceeding in an action on a promissory note that he had received from the bankrupt for his bill of costs in procuring his certificate, the bankrupt having purchased the debts of many of the creditors, and the solicitor being indebted to the estate in such a sum, that the share of it coming of the debts so

(a) See *ante*, 24.

**EASTER
TERM,
1817.**

Ex parte **ANDERSON.**—In the Matter of **PLATT**
and **KAYE.**

A person keeping out of the way to avoid the service of an order made upon petition in bankruptcy, it was ordered upon motion, that service at his office should be good service.

AN Order in this bankruptcy had been made upon petition, that Blandford an attorney and another person, should upon being personally served with the order, pay into the bank of Messrs. Jones, Lloyd and Co. a sum of money, in the names of persons therein mentioned.

Mr. Ross, upon an affidavit made by the clerk of the petitioner's solicitor, shewing that Blandford kept out of the way to avoid the service of the order, moved the court that service of the order at Blandford's office might be good service.

The **LORD CHANCELLOR** made the order.

**EASTER
TERM,
1817.**

Ex parte **HARFORD.**—In the Matter of **BROWN.**

Petition to stay a certificate must be personally served on the bankrupt before the petition day.

THE commissioners had signed the bankrupt's certificate on the 22nd. February. This petition to stay the certificate was answered by the Lord Chancellor on the 18th. of March for the next day of petitions. The next petition day was on the 19th and the petitioners suffered that day and another day of petitions to pass by without serving the bankrupt personally. The petition having been served upon the

bankrupt's solicitor, the bankrupt filed an affidavit in answer to it. 1817:

Ex parte
HARFORD.
—In the
Matter of
BROWN.

Mr. *Hart* applied to the court to have the certificate allowed.

Mr. *Heald* opposed the application, on the ground, that as the bankrupt had filed an affidavit, he had waived the right of being personally served.

The LORD CHANCELLOR allowed the certificate. (a)

(a) *Ex parte Kendall.* 1 B. C. 187. And see *Ex Ves. and Beam.* 543. *Ex parte Groome*, the next *parte Coulbourn.* 2 *Rose*, case.



Ex parte GROOME.—In the Matter of ———. LINC. INN,
May 22,
1817.

THIS petition to prove a debt and to stay the certificate, was presented before the bankrupt had passed his last examination. Though a bankrupt applies to the court to have a petition to stay his certificate advanced, yet that is not a waiver of his right to be personally served before the petition day.

After the petition had been presented, the bankrupt procured his certificate, which was allowed by the commissioners. The petition had not been personally served upon the bankrupt before the day for which it was answered, but after that day, upon the bankrupt's application, it had been advanced in his Lordship's paper (a). *Seems a petition to stay a certificate prospectively cannot be supported.*

Mr. *Bell* and Mr. *Montagu* insisted, that a petition to stay a certificate by anticipation could not be at-

(a) *Ex parte Harford*, the preceding case.

1817. attended to, or that if it could, and was to be considered as the common case of a petition to stay a certificate, then that it must be subject to the common rule that applies to such petitions, namely, that of personal service upon the bankrupt before the petition day.

Ex parte
GROOME—
In the
Matter of

Mr. *Hart* and Mr. *Horne* for the petition. Petitions of this nature are of every day's occurrence, where a creditor seeks to be admitted to prove a debt, and the rule only applies where the sole object of the petition is to stay the certificate. As to the objection, that the bankrupt has not been personally served, he is not in a condition to take advantage of it; for he not only now appears, but it was upon his application that your Lordship advanced the petition.

THE LORD CHANCELLOR

Was strongly inclined to think that a prospective commission to stay a certificate before the bankrupt had passed his last examination could not be supported; but it was not necessary to determine that question, as he thought himself bound to allow the certificate, the bankrupt not having been personally served with the petition within the proper time. He was also of opinion, that, although the bankrupt himself applied to advance the petition, and now appeared to oppose it, yet that he was not prejudiced by those acts, which did not amount to a waiver of his right to be personally served with the petition.

Ex parte BENJAMIN.—In the Matter of PHIL-
LIPS.

EASTER
TERM,
1817.

THIS was a petition by legatees to be admitted to prove for a legacy under the commission of the executor.

An attachment of the bankrupt after the commission has issued for non-payment of money into court, under an order in a suit instituted against him before the commission issued, is not such an election to proceed against the person of the bankrupt as will satisfy the debt.

Previous to the bankruptcy, the legatees had commenced a suit in Chancery for an account and payment of the legacies against the executor. The usual order had been made in the cause for the defendant to pay the money received by him from the testatrix's estate into court, and upon his non compliance with that order, the plaintiffs, the present petitioners, caused him to be attached.

The commission had issued when the attachment was executed, and it appeared that when the sheriff's officer took the bankrupt into custody, he had notice of the commission and that he acted under a promise of indemnity by the petitioners.

Sir *Samuel Romilly* and Mr. *Collinson*, for the legatees.

Mr. *Hart*, Mr. *Agar* and Mr. *Montagu* on the other side.

If a creditor elects to take the person of his debtor in execution, that is a (a) satisfaction of the debt,

1817. *Ex parte BENJAMIN.* In the Matter of PHILLIPS. and an attachment issuing out of a court of Law, has been held to be a civil execution (a). Upon this principle a court of law will discharge a certificated bankrupt out of custody under an attachment (b). So also will the court of chancery (c), which shews there is not any substantial difference in attachments whether they issue from courts of law or equity.

The LORD CHANCELLOR.

The true question here is, not, whether a bankrupt having got his certificate is entitled to be discharged from the effects of an attachment, but whether this attachment, which was put in force with notice of the commission, is such an election to proceed against the person, as would have satisfied the debt, by analogy to the case of an execution. What might have been the effect of attaching the defendant, if the order had been to pay the money to the party, it is not necessary in this case to determine, for the order is to pay the money into court, and there is no case where the enforcing of such an order has been held to be a satisfaction of the debt.

(a) *Rex. v. Stokes.* Cow- per 136. *wers v. Colman.* Ante, 5 N.A.
 (b) *Baker's case.* 2 *(c) Wall v. Atkinson.*
Strange, 1152. and see *2 Rose, B. C. 196. Ex*
parte Parker. 3 Ves, 554.

EASTER TERM, 1817. *Ex parte MORTON*,—In the Matter of MORTON.

A commission cannot be supported upon a petitioning creditor's debt, made up of debts due to several persons, if one of them is an infant, and a separate creditor of the trader.

THIS was the petition of the bankrupt to supersede the commission. The principal question was upon the validity of the petitioning creditors debt. It appeared that there were three petitioning creditors whose

separate debts collectively amounted to £200 (a); but one of them was an infant. All the petitioning creditors, including the infant, had made the usual affidavit of the truth and reality of their debts.

1817.
Ex parte
BENJAMIN.
—In the
Matter of
PHILLIPS.

Sir Samuel Romilly and Mr. Montagu for the petition.

A petitioning creditor must give a bond to the great seal that he will prove his debt before the commissioners, and as an infant cannot bind himself, so he cannot be a petitioning creditor (b). The case of *ex parte Barron* it must be admitted was that of a sole petitioning creditor, but the principle equally applies where there are more debts than one: for the statute (b) requires the bond to be given, "for proving his, her, or their debts."

Mr. Hart and Mr. Rose contra. The statute only requires a security that the debt should be proved; and as in this case a bond has been given by two of the creditors, who are adults, that will satisfy the intention of the statute. This has been determined where the debt is a joint one, for a bond executed by one of the joint creditors, has been held to be sufficient (c).

THE VICE CHANCELLOR.

By the 5th Geo. 2d. c. 30. s. 23. petitioning creditors whether there be one or more, are required to make an affidavit of the truth and reality of the debt, and the same persons who are to make the affidavit

(a) 5 Geo. II. c. 30. s. 23. (c) *Ex Parte Hodgkinson*, 2 Rose. B. C. 172.
(b) *Ex parte Barron*, 3 Ves. 554.

1817.
Ex parte
BENJAMIN.
—In the
Matter of
PHILLIPS.

are also required to give a bond to the great seal, that they will prosecute the commission with effect. The statute expressly declares that these enactments were made for the purpose of preventing persons from taking out commissions maliciously, and the Lord Chancellor is thereby empowered, where the commission is sued out fraudulently and maliciously, to assign the bond to the party aggrieved, who may put it in suit; so that by this statute the bond is a security which the law gives to the bankrupt, and he has a right to say, that the bond so given, shall be good and effective to the full extent intended by the legislature. The legislature having provided that such a security should be given by persons at whose instance commissions of bankrupt are issued, it followed of course, that if a person could not give the requisite security, he could not be entitled to issue a commission, and so it has been determined in *ex parte Barrow*, where the petitioning creditor was an infant, and that case has never been overruled. But then it is contended to be sufficient if the bond is executed by some, and not by all of the creditors, and in support of that proposition, a case has been cited, where the debt was jointly due to two, and it was held, that if one of the joint creditors executed the bond that would satisfy the statute. That case was determined upon the practice of the bankrupt office recognized for a great length of time, which only requires one of the joint creditors to make the affidavit and give the bond, and for a very good reason, for the whole debt is the debt of each. Where the debt to support the commission, as in the present case, is made up of several separate debts it is admitted to be the practice of the office to require each of the creditors to make an affidavit of the truth and reality of his debt. I do not find any provision in the statute for cases where there are more than one peti-

tioning creditor, that one of them may guarantee the debt or the acts of the others. On the contrary, I think it was clearly intended, that the same persons who are to make the affidavit should also give the bond to the great seal, for if it were not so, that provision of the statute, which gives the bankrupt a remedy by obtaining an assignment of the bond against persons maliciously suing out the commission would be frustrated.

1817.

BENJAMIN.
—In the
Matter of
PHILLIPS.

The commission was superseded.

Ex parte HURD.—In the Matter of PARTINGTON.

EASTER
TERM,
1817.

THIS petition, to supersede a commission, being called on, and no one appearing to oppose it, the Vice Chancellor upon affidavit of service had ordered the commission to be superseded, and the order was confirmed by the Lord Chancellor (a).

The Lord Chancellor can direct the Vice Chancellor to hear a petition, for a writ of *procedendo* to issue where commission has been superseded on the Vice Chancellor's order confirmed by the Lord Chancellor.

(a) The confirmation of the order by the Lord Chancellor, after reciting the presentment of the petition, proceeded: "Whereupon I ordered all parties concerned to attend me on the matter of the said petition, and the same coming on to be heard this day before his Honor the Vice Chancellor, in the presence of counsel for the petitioner; and upon hearing the said petition, the several affidavits made and filed in this matter, "in support thereof, and "also an affidavit of *Jna. than Booth*, of service of the said petition, on the said *William Partington*, the bankrupt, the said *Thomas Bamforth*, the petitioning creditor, and the said *Jeremiah Buckley* the solicitor under the said commission read, it was ordered, that the said commission should be superseded, and that a writ of *supersedeas* should forthwith issue for that purpose. I do therefore

1817. *Mr. Leach* and *Mr. Rose* applied to the Vice Chancellor to have the petition restored, on the ground of the parties having been taken by surprise, as the petition stood at the bottom of his Honor's paper, and would not have been called, had not other petitions stood over to a future day, through the indulgence of the court to gentlemen who held briefs in them.

Ex parte Hurd.—In the Matter of PAR-
TINGTON.

Mr. Montagu insisted, that the Lord Chancellor having adopted the order, it became his own, and that the Vice Chancellor had not any authority to meddle with it.

The VICE CHANCELLOR

Recommended an application to be made to the Lord Chancellor.

Upon the point being mentioned to the Lord Chancellor by *Mr. Leach*, he was of opinion that the bankrupt ought to apply for a writ of procedendo, and that a petition ought to be presented for that purpose, which strictly speaking, could not be heard by the Vice Chancellor; but he conceived the Lord Chancellor had power to direct it to be heard by him (a).

"hereby confirm the said
"order so made as afore-
"said; but this is to be
"without prejudice to any
"such application respect-
"ing this order, as might
"have been made to me in
"case the said petition had
"been heard before me, and
"upon such hearing I had
"ordered the commission to
"be superseded."

ELDON, C.

(a) The second section of

the act 53 Geo. 3. c. 24. for
the appointment of an ad-
ditional judge, assistant to
the Lord Chancellor, to be
called The Vice Chancellor
of England, enacts, "That
"such Vice Chancellor shall
"have full power to hear
"and determine all causes
"matters and things, which
"shall be at any time de-
"pending in the court of
"chancery of England, ei-
"ther as a court of law,
"or as a court of equity,

"or incident to any ministerial office of the said court, or which have been or shall be submitted to the jurisdiction of the said court, or of the Lord Chancellor, Lord Keeper or Lords Commissioners for the custody of the Great Seal, for the time being, by the special authority of any act of parliament, as the Lord Chancellor, &c. shall from time to time direct, and all decrees, orders, and acts of such Vice Chancellor, so made or done, shall be deemed and taken to be respectively, as the nature of the case shall require, decrees, orders and acts of the said court of chancery, or of such incident jurisdiction as aforesaid, or under such special authority as aforesaid, and shall have force and validity, and be executed accordingly, subject nevertheless in every case to be reversed, discharged or altered by the Lord Chancellor, Lord Keeper,

or Lords Commissioners 1817.
 "for the custody of the great seal, for the time being; and no such decree or order shall be enrolled until the same shall be signed by the Lord Chancellor, Lord Keeper or Lords Commissioners of the great seal for the time being: *provided always, that such Vice Chancellor shall have no power or authority to discharge, reverse or alter any decree, order, act, matter or thing, made or done by any Lord Chancellor, Lord Keeper or Lords Commissioners for the custody of the great seal, unless authorized by the Lord Chancellor, Lord Keeper or Lords Commissioners for the time being so to do: nor any power or authority to discharge, reverse or alter any decree, order, act, matter or thing, made or done by the master of the rolls.*"

And see *Ex parte Cramp*, ante. 3.

Ex parte
 HURD.—In
 the Matter
 of PAR-
 TINGTON.

In the Matter of GRAHAM.

LINC. INN
 HALL.
 July 3rd.
 1817.

MR. MONTAGU applied to the Lord Chancellor, that a petitioning creditor, who had been detained in London a week, on account of the commissioners not having been able to attend to open the commission, Petitioning creditor permitted to prove his debt by affidavit.

1817. and who was called by business into the country,
 —In the might be permitted to prove his debt by affidavit.
 Matter of There was an affidavit of the fact.
 GRAHAM.

The LORD CHANCELLOR made the order (a).

(a) By the general order 26th Nov. 1798 2 Cooke
 B. L. 289. the commission- ers are directed to examine the petitioning creditor personally touching his debt.

LINCOLN'S *Ex parte* WILSON, } In the Matter of COLBECK
 INN HALL, *Ex parte* TODD, } and Co.
 Jan. 18.
 1817.

IN and previous to the year 1806, *William* and *John Holdsworth* carried on the business of flax dressers, in partnership with *Colbeck, Wilks* and *Ellis*, under the firm of *Colbeck, Watson and Co.* On the 30th of March, 1807, *William Holdsworth* executed a deed whereby, after reciting that the partnership had been dissolved in 1806, so far as related to him, and that upon such dissolution it was agreed that his share of the premises, and stock in trade should be assigned to *Colbeck* and *Ellis*, upon that will not with reference to creditors determine the partnership.

A retiring partner assigns all his share in the concern to two of the continuing partners upon trust for his infant children, in such shares as he should appoint, and in default of appointment upon trust for the children, to be divided amongst them, when the youngest shall attain to 21. Held, that the contingent interest the father had in the share so assigned, depending upon the death of any of the children under 21, was such an interest reserved by him in the concern as with reference to creditor prevented the determination of the partnership.

Whether the property of a dormant partner in the possession of the visible partner is within the stat. 21. Jac. 1. c. 19. s. 11. quære.

the trusts therein mentioned; he thereby, in pursuance of such agreement, assigned to *Colbeck* and *Ellis* his share in the said copartnership effects, upon trust for his three children, or such one or more of them for such estates or interests, and charged with such sums of money, for the benefit of the others or other of them, and in such manner; and subject to such powers of revocation and new appointment as he *William Holdsworth*, by any deed or instrument in writing, or by his will should appoint. But so as no such appointment should be made to take effect in possession, until the youngest of them should attain 21; and, in default of appointment upon trust for the children, to be divided amongst them when the youngest should attain to 21, and not before, and in the mean time the interest to be paid for their maintenance. And it was further provided, that the trustees might pay to the said *William Holdsworth*, out of the said trust premises, till the youngest child should attain 21, any sums or sum of money which they might think fit. After the execution of this deed the balance of *William Holdsworth's* share in the concern was placed to the account of the trustees, and the trade was carried on in the same premises, under the firm of *Colbeck, Ellis and Co.*

1817.
In the
Matter of
Colbeck

On the 1st. of January, 1809, another deed was made and executed by and between the four remaining partners, whereby *John Holdsworth* assigned all his share of the trade and premises to *Colbeck* and *Ellis*, upon trust to pay an annuity of £50 a year to himself for life, and after his death to his wife for life, and upon the death of the survivor in trust for their infant children. And it was also stipulated,

1817. that if the proceeds of *John Holdsworth's* share should not be sufficient to pay the annuity of £30 a year, then that it should abate proportionably; or on the other hand, if his share so assigned should amount in value to £5,000, that then the annuity should be increased to £100. After the execution of this deed *John Holdsworth* retired from the concern, but the style of the firm was not altered.

In the
Matter of
Colbeck.

William and *John Holdsworth* were also partners together, as watchmakers and hardwaremen, and on the 13th. of September, 1816, a commission issued against them, and they were declared bankrupts.

On the 31st. of October, 1816, a joint commission issued against *Colbeck, Ellis* and *Wilks*, under which they were declared bankrupts, as Partners and Flax Dressers.

On the 2d. of November, 1816, a commission of bankrupt issued against *Colbeck, Ellis, Wilks*, and the two *Holdsworths*, as Flax Spinners, and Co-partners, under which they were declared bankrupts.

Only two of *William Holdsworth's* children had attained to the age of twenty-one. It did not appear that *William Holdsworth* had executed the power of appointment given by the deed 30th. March, 1807. The first petition was presented by the assignees chosen under the commission against the five, and their petition, after stating the above facts, prayed that the two former commissions might be superseded, and that all proceedings under them might be stayed until after the hearing of the present petition. The other petition was a cross one by the assignees under the *Holdsworths'* commission.

CASES IN BANKRUPTCY.

51

Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Montagu*,
for the commission against the five, contended it
was quite clear that *John Holdsworth* did not cease
to be a partner upon the execution of the deed of
the 1st. January, 1809, as the income secured to him
by that deed was to arise out of, and be subject to the
fluctuations of the profits of the trade. That the
object of the deed of the 30th. March, 1807, was
fraudulent, as it attempted to give to *William Hold-*
worth all the substantial enjoyment of a partner in
the profits, and at the same time to exonerate him
from all liability to the persons who might become
creditors of the partnership concern—That *William*
Holdsworth had not assigned the whole of his inte-
rest, for if any of his children had died under 21
their interest was not disposed of, and would of course
result to the father, and therefore *William Hold-*
worth, to the extent of that interest, and which de-
pended upon the profits and losses of the trade,
must be considered as not withdrawing himself from
the partnership.

1817.

In the
Matter of
COLBECK.

Mr. *Leach*, Mr. *Cullen*, and Mr. *Barber*, on the
other side, argued, that admitting the two *Hold-*
worth's to have been partners, they were dormant
partners, as their names did not appear in the firm,
and they did not respectively take any active part in
the management of the trade since the execution of
the two deeds. That a creditor can support an
action at law against the visible partners of a firm,
and therefore a commission of bankrupt, which is a
statutable execution, is good th. issues against visible
partners only. That at all events, the two *Hold-*
worths were merely two out of many cestuique trusts,
and that, if the commissions were to be superseded,

1817.
 In the
 Matter of
 COLBEC.

it ought to be in favour of a commission, that included all the adult children of the *Holdsworths*, as partners in the concern.

THE LORD CHANCELLOR.

The commission against the five is unquestionably an invalid one; but the court, in cases where several commissions have issued against partners, if it be for the interest of all parties, will remove the first out of the way, either by superseding them, or by making such arrangements as to render it impossible to take advantage of the objection to the subsequent commission. The first question then is, whether the *Holdsworths* are to be considered as partners with the other three?

As to John, he certainly must be taken to have retired from the business reserving an interest in the profits of the trade, for the annuity he reserved was not merely an annuity the amount of which was calculated with reference to the then present profits, but it was to be paid out of the profits, and to be subject to abatement or enlargement as the profits might fluctuate. His partnership therefore was never determined. With respect to *William Holdsworth* it is to be remarked, that the deed of the 30th of March, 1807, is not a distinct transaction unconnected with the proposed dissolution of partnership in 1806, but it was made and executed in pursuance of the agreement of 1806, and therefore must be taken to express the terms upon which the parties proposed to effect that dissolution.

Admitting, for the purposes of this argument the deed of 1806 to be valid, it seems that the trustees, provided

they gave the children a maintenance, were thereby empowered to apply at their discretion the property for the benefit of the father. I cannot agree in thinking that the children took vested interests during infancy, and it is very difficult to say, whether they would or not take any thing in the event of the youngest child dying under 21, but admitting, that the court, struggling as it does to give effect to dispositions in favour of children, should be of opinion that the survivors would take their own respective shares, yet it is quite clear they would at all events take as tenants in common, and that if one died an infant, his share of the accumulated profits of the trade would be undisposed of and consequently result to the father. Independent of these circumstances there is a great difficulty in this case, as it embraces the question relating to a dormant partner's property left in the ordering and disposition of the visible partners. That question has been represented to be one of little difficulty, (a) but it was that which caused so much embarrassment in *Lane, Fraser and Boylston's* case. I will myself give out the minutes of the order.

1817.
In the
Matter of
COLBECK.

The LORD CHANCELLOR made the following order:

In the several Matters of *Thomas Colbeck, William Ellis, Jacob Wilks the elder, William Holdsworth and John Holdsworth* and of the said *Thomas Colbeck, William Ellis and Jacob Wilks the elder*, and of the said *William Holdsworth and John Holdsworth* Bankrupts,

(a) *Coldwell v. Gregory.* 256. *Ex parte Barrow.* 2
1 *Price.* 119. and see *Ex Rose B. C. 252.*
parte Dyster. 2 *Rose B. C.*

1817:
 In the
 Matter of
 COLBECK.

“ Now upon hearing the said petition read, and what
 “ was alledged by the counsel for the said parties,
 “ and it appearing &c. that *William Holdsworth*
 “ of Bradford, in the county of York, and *John*
 “ *Holdsworth* of Morley, in the parish of Batley, in the
 “ county of York, against whom together with *Thomas*
 “ *Colbeck, William Ellis* and *Jacob Wilks* the elder,
 “ a commission of bankrupt was, on or about the 2d
 “ day of November, 1816, awarded and issued by the
 “ name and description of *Thomas Colbeck* of West-
 “ house, in the parish of Fewston, in the county of
 “ York, *William Ellis* of Castlefield, in the parish of
 “ Bingley, in the county of York, *Jacob Wilks* the
 “ elder, of Bingley, in the said parish of Otley, in the
 “ county of York, *William Holdsworth* of Bradford,
 “ in the county of York, and *John Holdsworth* of
 “ Morley, in the parish of Batley, in the county of
 “ York, flax spinners, copartners, dealers and chap-
 “ men, carrying on business at Westhouse aforesaid,
 “ under the firm of *Colbeck, Ellis and Co.* were at the
 “ time of suing forth the said commission copartners
 “ in the said concern. I do order that the said com-
 “ missioners, in the said commission named, or
 “ the major part of them do forthwith proceed in the
 “ execution thereof, and I do order that the commis-
 “ sioners in the commission of bankrupt awarded and
 “ issued against the said *William Holdsworth*, of
 “ Bradford, in the county of York, and *John Holds-*
 “ *worth* of “ Morley, in the parish of Batley, in the
 “ county of York, watchmakers, hardwaremen, dea-
 “ lers, chapmen and partners, carrying on trade at
 “ Bradford under the firm of *William Holdsworth* and
 “ *Co.* do desist from further prosecuting the same, save
 “ and except that the assignees under such commis-
 “ sion be at liberty to call a meeting of the com-
 “ missioners, to declare a dividend of any monies in

CASES IN BANKRUPTCY.

55

" their hands arising from the estates of such bank-
 " rupts, that such dividend be declared and made
 " accordingly, and thereupon I order that the said last
 " mentioned commission and the proceedings under the
 " said commission, together with the assignment from
 " the said commissioners to the assignees of the said
 " estate and effects be impounded in the office of the
 " secretary of bankrupts, and that the said commis-
 " sion and the proceedings under the same, and the
 " said assignment be not taken out or used by any per-
 " son whatsoever without my further order, but that all
 " sales and proceedings under such commission shall
 " be confirmed by the said assignment, under the said
 " commission, against the said *Thomas Colbeck*,
 " *William Ellis*, *Jacob Wilks* the elder, *William*
 " *Holdsworth* and *John Holdsworth*, and I do order
 " that the proof of the debts under the said commis-
 " sion against the said *William Holdsworth* and *John*
 " *Holdsworth* be transferred to the said commission,
 " against the said *Thomas Colbeck*, *William Ellis*,
 " *Jacob Wilks* the elder, *William Holdsworth* and
 " *John Holdsworth* and after such dividends shall
 " be declared under the said commission, against the
 " said *William Holdsworth* and *John Holdsworth* as
 " aforesaid. I order that the assignees of the said
 " *William Holdsworth* and *John Holdsworth* do
 " forthwith account to the assignees under the said
 " commission, against the said *Thomas Colbeck*,
 " *William Ellis*, *Jacob Wilks* the elder, *William*
 " *Holdsworth* and *John Holdsworth* for all the
 " estate and effects received by them under the said
 " commission, on the footing of such dividend, and
 " pay to the petitioners the sums of money being in
 " their hands after payment of such dividend, and
 " also deliver up the estate and effects of the said

1817.

In the
Matter of
COLBECK.

1817, " bankrupts remaining in their custody, possession;
 In the " or power, and I do order that the commissioners
 Matter of " in the said commission of bankrupt, bearing date
 COLBECK. " the 31st. day of October, 1816, awarded and issued
 " against the said *Thomas Colbeck*, *William Ellis*;
 " and *Jacob Wilks* the elder, by the description of
 " *Thomas Colbeck* of Westhouse, in the parish of
 " *Fewston*, in the county of *York*, *William Ellis* of
 " *Castlefield*, in the parish of *Bingley*, in the county of
 " *York*, and *Jacob Wilks* the elder of *Burley*, in the
 " parish of *Otley*, in the county of *York*, Flax Spinners;
 " dealers and chapmen, desist from further prosecut-
 " ing the same, and I do order that the said last menti-
 " oned commission, and the proceedings under the said
 " commission, and the assignment from the commis-
 " sioners to the said assignees under the said commis-
 " sion, be impounded in the office of the secretary of
 " bankrupt, and I do order that the said commission and
 " the proceedings taken under the same, and the said
 " assignment be not delivered out or used by any per-
 " son or persons whatsoever, without the further order
 " of this court, and I do order that the proofs of debts
 " under the said last mentioned commission, be trans-
 " ferred to the said commission against the said *Thomas*
 " *Colbeck*, *William Ellis*, *Jacob Wilks* the elder,
 " *William Holdsworth* and *John Holdsworth*, and I
 " do order that the joint debts against the three first
 " named parties, be taken on such transfer as joint
 " debts of the said *Thomas Colbeck*, *William Ellis*,
 " *Jacob Wilks* the elder, *William Holdsworth* and
 " *John Holdsworth*, and I order that the said assignees
 " of the estate and effects of the said *Thomas Colbeck*,
 " *William Ellis* and *Jacob Wilks* the elder, do forth-
 " with account to and deliver up to the petitioner, all the
 " estate and effects of the said bankrupt in their cus-

"tody, possession or power, and I order that the said
 "commissioners named in the said commission against
 "the said *Thomas Colbeck, William Ellis, Jacob*
 "*Wilks* the elder, *William Holdsworth* and *John*
 "*Holdsworth*, or the major part of them, do cause dis-
 "tinct accounts to be kept of the separate estate and ef-
 "fects, of the said bankrupts and of any two or more of
 "them, if any such there be, with the usual directions to
 "receive proofs and divide the effects, and I do order that
 "the petition of the said *John Todd* and *John Beattie*
 "be dismissed, and I do order that it be referred to
 "Mr. *Jekyll* one of the masters of the court of chancery
 "to tax all parties their costs of and occasioned by the
 "said commission of bankrupt, and the proceedings
 "under the same, and also the costs of and occasioned
 "by the said petitions, such cost to be paid out of the
 "estate and effects of the said *Thomas Colbeck, Wil-*
 "*liam Ellis, Jacob Wilks* the elder, *William Hold-*
 "*sworth* and *John Holdsworth* under the said com-
 "mission of bankrupts."

1847.
 In the
 Matter of
 Colbeck.

ODWIN v. FORBES.

At the
 Cock Pit,
 Saturday,
 31st May, 1817

THIS was the case of an appeal from a judgment of the court of justice at Demerara of the 14th May, 1814, and the question was as to the effect of a certificate obtained under an English commission of bankrupt when pleaded in a foreign and independent jurisdiction.

To a suit instituted in the Dutch colonial court at Demerara, for the recovery of the balance of an account for sugars consigned to and received by the defendant and his partner in London, the defendant pleaded his bankruptcy in

The case was shortly this: The plaintiffs who were planters, resident at Demerara had shipped sugars to England (of which the plaintiffs had notice, but had not proved their debt under it) and certificate, held, that the bankruptcy and certificate were a discharge of the debt.

1817. *the house of Turnbull, Forbes and Co. of London,*
 In the for which they drew bills; some of these bills were ac-
 Matter of cepted by that house before their bankruptcy, and
 Odwin others, which the house had engaged by letter to accept
 ~ arrived after the bankruptcy. The former of these
 FORBES. bills were returned to the plaintiffs protested for non-
 payment, and the latter for non-acceptance.

The defendant *Forbes*, after duly obtaining with his partners his certificate in England, went out to Demerara, where he settled, and the plaintiffs, who it seems had full notice of the commission, although they had not proved under it, sued him there for the debt on the balance of the account before the bankruptcy, together with the costs and damages and the exchange on the protested bills which they had been obliged to take up.

To this action, the defendant pleaded his certificate duly obtained in England as a discharge, and that the plaintiffs had notice of the commission and might have proved under it.

To this plea the plaintiffs replied that there were no bankrupt laws at Demerara, and that the English bankrupt laws were of no force in that colony, as it was to be considered as a foreign and independent jurisdiction in this respect, and bound only by the laws of Holland which prevailed there, and which had been secured to them by the articles of capitulation at the time of the surrender of the colony to the English. And in support of this argument the counsel for the plaintiffs quoted the opinion of Lord *Talbot* while at the bar, cited in *Beaves's Lex Mercatoria*, that the English bankrupt laws were not binding in the colonies, so far as regards

CASES IN BANKRUPTCY.

18

the certificate and discharge, although he was of opinion, that the assignment under them would reach the foreign property. He also quoted, from a celebrated Dutch writer on the law of merchants—" *Barl's Advysen over den Koophandel & Zeevaart.*" the opinion of Lord *Raymond* while at the bar, with that of several English counsel his cotemporaries, upon a special case sent to them from Holland by the curators of a bankrupt's estate there to ascertain whether they could restrain the English creditor from proceeding against the property in London by attachment, Which opinions were, "That the English creditor might proceed by attachment in the Lord Mayor's court at London after the bankruptcy in Holland, instead of coming in under the commission at Amsterdam, and that the Dutch bankrupt laws were not noticed in England."

1817:
In the
Matter of
Odwin
v.
Forsyth.

The case being perfectly new in the colony, and of considerable difficulty, the court took time to consider, and the cause stood over till the next session, when the late President of the court. (a) pronounced judgment in the case, wherein, after reviewing the foreign and English laws on the subject, he observed that Lord *Mansfield's* doctrine in the case of *Ballantine v. Golding*, which had been quoted in the argument for the defendant, namely, "that where there is a discharge by the law of one country it will be a discharge in another," however true in principle and founded in equity, had

(a) *J. Henry, Esq.* who intends shortly to favor the profession with his very elaborate judgment in this case, of which the above is an outline.

1817. *not yet been sufficiently adopted as part of the law of nations, to render it like judgments in the courts of Admiralty and Prize Courts, binding and conclusive in foreign and independent courts, and could only be admitted under the principle of comity in those courts, and therefore the English certificate could not be pleaded in bar at Demerara with the same legal effect as in Westminster Hall, nor under the same obligation on the courts to admit it, as they were not bound by the English bankrupt statutes, and no parties to them. And, that with this distinction between the equity of Lord Mansfield's doctrine in giving effect to the certificate by comity, and the strict law of Lord Talbot, in denying it a statutable effect in the colonies, their opinions on this point, which seemed at the first view to be at variance, might perhaps be reconciled.*

*In the
Matter of
Odwin
v.
Forbes.*

That the question, and the difficulty in this case was whether the court at Demerara could give effect to the English certificate, supposing it to have been duly obtained, which was not contradicted on the record, and as there was no precedent in their proceedings to guide them; and no positive law or statute on the subject, and the question was perfectly *Res Integra* in that court; they must seek for precedents in the law of the mother country of the colony, Holland; and go into the principle itself. And in the laborious search which he had felt it his duty to make, he had found that the principle of the courts of Holland in such cases was reciprocity, and mutual comity, and that the Dutch courts were in the practice of giving effect to foreign judgments, when the same comity was exercised with respect to theirs.

That the confirmation of the English certificate by the Lord Chancellor, was, in fact, a judgment in this respect, so far as it regarded foreign states. And it appeared from the cases of *Sill v. Wornwich*, *Solomons v. Ross*, and *Jollet v. Deponthieu*, quoted in *Cooke's Bankrupt Laws*, also from *Potter v. Brown*, 5 East. 123, that whatever might have been the opinion in Lord *Raymond's* time, yet a more liberal doctrine prevailed in England at present, and that the Chancellor in the three first cases cited, and which had never been contradicted, had restrained the English creditors from gaining a preference by attachment in London, and reduced him to the necessity of proving under the commission before the chamber of desolate estates at Amsterdam, on the application of the curator, in whom the whole of the property of the debtor vested on the appointment; and the judgment in bankruptcy in Holland, was equally general with that in England, and was in fact termed by the foreign jurists, the *Judicium Concursus generalis Creditorum*.

1817.
In the
Matter of
Odwin
v.
Forbes.

The effect given in England to the Dutch bankrupt laws, was further shewn by the observation which fell from Lord *Mansfield* in the case already mentioned of *Ballantine v. Golden* who stated that he recollected the case of a *cessio bonorum* in Holland having been held to operate as a discharge in England. And although the *cessio bonorum* in Holland did not operate as a discharge in that country, no more than the insolvent acts in England from the debts, or do more than free the person, and the case in this point was probably misreported, yet it was sufficient to shew, that the Dutch law in this instance had been noticed and respected. These cases in the English books shewed clearly that the principle of comity in bankrupt cases had been acted

1817.
In the
Matter of
ODWIN
v.
FORBES:

upon in England with respect to Holland, and therefore a Dutch court, as that of Demerara, seemed bound to exercise the same comity in a similar case from England, when not restrained by any positive law, custom, or precedent.

But the principle of giving effect to the foreign judgment, or certificate of discharge, seemed still clearer from the opinion of the most eminent Dutch lawyers, who had laid down the same doctrine as Lord Mansfield on this point, and almost in the same words.

Their opinions were the more important, as in the case before the court, the question was not merely what was the English law on this subject, but what was the Dutch law as to the effect of a foreign discharge, and how far a Dutch court was at liberty to give effect to an English statute of bankruptcy, or could do it without prejudice to its own citizens, in which case the principle of comity must give way.

Among several cases which he had found of the authority and effect which the Dutch lawyers were of opinion ought to be given to foreign judgments and certificates in bankruptcy, one appeared very closely to resemble that before the court, and which was to be found in the 3 vol. of the *Nederland's Advys Boek Consultatie* 238 p. 626.

It was the case of a merchant at Amsterdam, who had drawn bills on London in favor of a Frenchman, which bills were dishonoured, and the drawer having failed afterwards, obtained his certificate, and discharge from the commissioners of the chamber of desolate estates at Amsterdam, and who happening af-

CASES IN BANKRUPTCY.

69

terwards to be at Paris, was sued there on these bills, and on pleading his certificate before the court there, a case was made for the opinion of Dutch counsel as to the nature and extent of the certificate obtained under the bankrupt laws of Holland, who were of opinion, that it ought to operate as a bar to the foreign creditors, as they were cited under the commission in Holland.

1817:
In the
Matter of
OWEN
v.
FORBES.

But it might be said that this was a case in which the Dutch lawyers merely gave effect to their own laws; however it appeared from a book of authority, he had already quoted (*Barels Advysen*) that they have acted on the same principle with respect to foreign laws—For in the case of a Jewish merchant at Lisbon who had been thrown into the inquisition there on account of his religion, and all his property confiscated: the funds, which it seems were ample for the payment of his debts, were first applied for this purpose, and the merchant having obtained his release from the inquisition, afterwards withdrew to the Dutch colony of Curaçoa, and set up a house of trade there, where he was afterwards sued by one of his old creditors, who it seems resided at Lisbon, and had abundant opportunities of coming upon the confiscated property, and on a case made by the court at Curaçoa for the opinion of counsel at Amsterdam, as to the creditor being barred by the sentence of confiscation at Lisbon, and his neglect in proving his debt there, and receiving payment out of the confiscated funds, their opinion was, that although by the law of Holland confiscation did not operate as a discharge to the debtor, "*nam debitorum pactionibus & delictis, creditorum petitio nec tolli nec mutari potest;*" yet as it appeared that it did by the law of Portugal, where the cause of action arose, and which fol-

1817: followed the Roman law very closely in this respect, the
 In the creditors were barred, as it was a discharge by the
 Matter of laws of the country, where the act of confiscation took
 Odwin place, and which was equivalent, or intended to be to,
 v. a general assignment of the whole of the property of
 Forster. the debtor.

On the strength of these cases and opinions, and others which the president noticed in the course of the judgment, and on the principle of comity and reciprocity, which had been shewn to exist between England and Holland in matters of bankruptcy, and still further on the grounds that the effect of the certificate ought in justice to be co-extensive with the assignment, and that if foreign courts allowed the assignees under the English commission to strip the debtor of his foreign property, by giving effect to the assignment in their jurisdiction, they were bound in justice to give equal effect to the certificate, and not leave him liable to the actions of the foreign creditors, on which, and other grounds noticed in the judgment, the president pronounced the unanimous opinion of the court to admit the certificate as a discharge. (a)

From this judgment the plaintiffs appealed to the king in council, and the cause was heard on an appeal at the Cock Pit on Saturday, 31st. May, 1817, when

The COURT (b)

Affirmed the judgment, and gave £40 costs, to mark their opinion that the appellant ought to have acquiesced in the judgment.

(a) At the time when this judgment was pronounced, B. C. 462. was not known at Demerara.
 the decision in the bankruptcy of *Stein and Co.* 1 *Rose* (b) Ex relatione.

CASES IN BANKRUPTCY.

65

Mr. *Bell* for the appellant.

Sir *Samuel Romilly* and Mr. *Stephen* for the respondent.

1817.
In the
Matter of
ODWIN
v.
FORBES.



TWOGOOD v. HANKEY.

TWOGOOD v. NEAVE.

LINCOLN'S
INN HALL.
July 21,
1817.

BY a decree made in the original suit August, 1802, it was ordered that the master should appoint a proper person or persons to collect in the outstanding debts due to the partnership of *Miles* and *Swanston*, in the usual manner, and that Sir Richard *Neave*, one of the defendants and surviving assignee of *Miles* and *Swanston*, should empower such person or persons so to be appointed to make use of his name for the purpose aforesaid, he being indemnified in respect thereof, and the master to settle such indemnity. A receiver was afterwards duly appointed, and Sir Richard *Neave* executed the proper powers of attorney. In 1810 Sir Richard *Neave* died, having appointed his son Sir Thomas *Neave* and *Beeston Long* his executors, against whom the plaintiffs filed a bill of revivor, to which they put in their answers insisting, that a renewed commission of bankrupt ought now to be issued against *Miles* and *Swanston*, and new assignees chosen and appointed in the stead of Sir Richard *Neave* deceased, and that the original suit and proceedings ought to be revived and carried on against such new assignees, and not against them as the personal representatives of Sir Richard *Neave*.

The representatives of a surviving assignee of an estate that had paid 20s. in the pound, all the commissioners being dead, were ordered to execute a power of attorney to a receiver appointed under a decree of the court in a cause in which the surviving assignee was a defendant, to collect and get in the said estate, they being indemnified.

1817. It appeared that the estate of *Miles* and *Swanston*
 Twogood had paid twenty shillings in the pound. The commis-
 v. sion was dated 29th January, 1781, and all the com-
 HANKEY. missioners to whom it had been directed were dead.
 Twogood

v.
 NEAVE. Under these circumstances the plaintiffs gave a notice
 of motion, that the suit and proceedings therein might
 stand revived against Sir Thomas *Neave* and Beeston
Long, the personal representatives of the late defendant
 Sir Richard *Neave* deceased, they having appeared and
 put in their answer to the bill of revivor filed against
 them, and that the said defendants Sir Thomas *Neave*
 and Beeston *Long*, as the personal representatives of
 the said Sir Richard *Neave* deceased, might be ordered
 to execute one or more power or powers of attorney,
 to authorize and empower the plaintiff John *Twogood*
 (who was by an order made in the first mentioned cause,
 bearing date the 1st of April, 1808, appointed to col-
 lect in and receive the outstanding debts due and owing
 to the house or firm of *Miles* and *Swanston*, in the
 pleadings in these causes mentioned) to use the names
 of them the said Sir Thomas *Neave* and Beeston *Long*,
 as the personal representatives of the said Sir Richard
Neave, in his capacity of surviving assignee of the
 estate and effects of the said house or firm of *Miles*
 and *Swanston*, for the recovery of the said outstand-
 ing debts, and with power therein to the said John
Twogood to substitute and depute other persons to act
 under and for him, without subjecting them the said
 Sir Thomas *Neave* and Beeston *Long*, or the estate of
 the said Sir Richard *Neave* deceased, to any responsi-
 bility in respect of their so doing, and they being in-
 demnified by the said John *Twogood*, in like manner
 as the said late defendant Sir Richard *Neave* was in-
 demnified under the said order of the 1st of April,

CASES IN BANKRUPTCY.

1808. And that the said John *Twogood* may be at liberty, with the approbation of the master, to whom the said first mentioned cause stands referred, to appoint such person or persons as the said master shall approve, as his the said John *Twogood's* deputy, attorney or attorneys in the West Indies, to act for him in calling in and recovering the said outstanding debts, without subjecting him the said John *Twogood*, to any responsibility for the acts or receipts of such deputy, attorney or attorneys so to be appointed.

1817.
Twogood
v.
Hankey.
Twogood
v.
Neave.

Sir Samuel *Romilly* and Mr. *Daniel* for the motion.

Mr. *Hart* and Mr. *Swanston* for some of the representatives of *Miles* and *Swanston*.

Mr. *Phillimore* for Sir Thomas *Neave* and *Beeston Long* contended that, as the estate had paid twenty shillings in the pound, the commission ought to be superseded.

The LORD CHANCELLOR

Was of opinion, that as there could not be a renewed commission, all the creditors having been paid the full amount of what was due to them, and as he could not supersede the commission, sales of the estate having taken place under it to a considerable amount, the only course left for him to pursue was to make the order as mentioned in the notice of motion.

LINO. INN, *Ex parte* CUTTEN, } In the Matter of HUGHES
 July 24, *Ex parte* APPLETON } and FISHER.
 1817.

It is in the discretion of the court to supersede a commission, whether the bankrupt has or has not got his certificate under it; but the court would not do so upon the petition of joint creditors (who suffered a considerable time to elapse without having obtained an order to prove for the purpose of assenting to or dissenting from the certificate) in a case where the certificate was lying for confirmation, and no misconduct was imputed to the bankrupt.

HUGHES and Fisher were partners in an adventure to the East Indies, and on the 10th February, 1816, a separate commission issued against *Hughes*, and he was declared a bankrupt. On the 6th June, 1817, a separate commission issued against *Fisher*, under which, he was also declared a bankrupt. On the 17th June, 1817, a joint commission issued against *Hughes* and *Fisher*, under which, they were declared bankrupts, and the petitioner *Cutten* was appointed the provisional assignee of their estate and effects, and the usual assignment made to him.

The petition of the provisional assignee, presented 30th June, prayed that the two separate commissions might be superseded, and that the proofs taken under them might be transferred to the joint commission. On the 8th July the petitioner *Appleton* was chosen the sole assignee under the joint commission, and on the 12th July he presented his petition to stay *Hughes's* certificate under the separate commission which had been signed in the usual way, and was then lying before the Lord Chancellor for his confirmation and allowance.

Sir Samuel Romilly and Mr. Heald for the petition.

Mr Hart and Mr. Cooke opposed it, on the ground that a provisional assignee could not be permitted to

agitate a question of this nature. That he was merely a person to whom the assignment was made for the security of the property; and as he was not a creditor he could not be heard upon a petition which, if allowed, would operate in fact as a disallowance of the certificate. They also contended, that though the petition of the assignees stated them to be creditors, yet that the affidavit filed according to the general order, when the petition was presented, did not go to that extent, and that as a subsequent affidavit could not be received, the petition to stay the certificate must be dismissed, and the certificate allowed, as though such petition had never been presented; and that being the true state of the case, it put the parties in the same situation as though the certificate had been allowed and a petition to supersede had been presented, which must be dismissed, unless the certificate were impeached on the ground of fraud.

1817.
Ex parte
 CUTTEN.
Ex parte
 APPLETON.
 — In the
 Matter of
 HUGHES
 and
 FISHER.

Sir Samuel Romilly, in reply, admitted that the objection relating to the petition not being verified by the affidavit was a good one; but he insisted that the Lord Chancellor would not have allowed a certificate if he were aware that a petition had been presented to supersede the commission.

The LORD CHANCELLOR

Did not doubt its being in the sound discretion of the court to supersede a commission, whether the bankrupt had, or had not got his certificate under it. But he thought in this case, where no misconduct was imputed to the bankrupt, and where the commission had issued so long since as February, 1816, and the joint creditors had never applied for an order to come in and prove, for the purpose of assenting to or dissenting

1817.

Ex parte
CUTTEN.*Ex parte*
APFLETON.—In the
Matter of
HUGHES
and
FISHER.

from the allowance of the certificate, that it would be a great hardship upon the bankrupt to supersede the separate commission, and thus deprive him of his certificate, more especially as the only partnership transactions consisted of a joint adventure to the East Indies, the accounts of which might, without great difficulty, be kept under the usual order; and if the joint creditors wished it they might have a person appointed to attend to their interests in taking the accounts.



LINCOLN'S
INN HALL,
July 25th.
1817.

Ex parte **STORY.**—In the Matter of **STORY.**

A separate commission directed to a joint creditor who acted under the commission and permitted his debt to be proved without an order from the Lord Chancellor superseded at the cost of the petitioning creditor.

THIS was the bankrupt's petition to supersede the commission on three grounds. First that there was not a valid petitioning creditors debt. Secondly that he had not committed an act of bankruptcy, and lastly that the manner in which the commission had issued, and the subsequent proceedings under it, were such an abuse of the authority of the great seal, as called for the interference of the court to supersede the commission. The facts so far as they relate to the last point, insisted upon by the petitioner, and that upon which the Lord Chancellor determined the question, were the following.

In February, 1815, one *Cornfoot*, of North Shields, agreed with *Linskill Holland Fenwick* and *Cockerell*, ship builders, at South Blyth, in Cumberland, to build a vessel for him, upon a contract reduced into writing. *Linskill* also carried on the separate trade of a ropemaker, and it appeared that *Cornfoot* agreed with him to furnish the vessel with cordage. Some-

time afterwards *Cornfoot* agreed with the petitioner *Story*, to sell him a quarter of the vessel, and *Story*, who was a seafaring man, was to have the command of her. The vessel was launched, and fitted out, and sailed with a cargo of coals for London under the command of the petitioner, and whilst she was lying in the river, the messenger under a commission that had issued against *Cornfoot*, took possession of her. The commission against *Cornfoot* had issued on the petition of *Linskill Holland Fenwick* and *Cockerell*, upon the debt due to them on the ship building account. *Fenwick* and *Cockerell* were both solicitors, and *Cockerell* was the solicitor who sued out the commission, which he procured to be directed to *Fenwick* as one of the commissioners. Under this commission, *Cornfoot* was declared a bankrupt. On the 5th of August *Linskill* arrested *Story* and held him to bail, for a debt on account of cordage furnished to the vessel, and on the 20th of the same month a commission of bankrupt is sued against *Story* upon the petition of *Linskill*, who proved the same debt as petitioning creditor. *Cockerell* was the solicitor to this commission, which was also, as well as that above mentioned, directed to *Fenwick* as one of the commissioners. *Story* was declared a bankrupt, and the commissioners of whom *Fenwick* was one, allowed without any order for that purpose having been first obtained from the Lord Chancellor, *Linskill Cockerell Fenwick* and *Holland* to prove a debt of £1,500 and upwards, alledged by them to be jointly due from *Story* and *Cornfoot* on the ship building account.

1817.

Ex parte
STORY
—In the
Matter of
STORY.

Mr. *Leach*, Mr. *Horne* and Mr. *Roots* for the petition; upon the last point, insisted that it was the case of a fraud upon the great seal, whose authority had been

1817.

Ex parte
STORY
—In the
Matter of
STORY.

abused by the management of the solicitor to the commission, who had procured the commission to be directed to a person that was, or pretended to be a creditor of the bankrupt, and that as the commission was founded in fraud and injustice, the court would immediately supersede it, and would not enter into a discussion of the facts arising out of a transaction so radically corrupt.

Sir *Samuel Romilly* Mr. *Cooke* and Mr. *Cullen* on the other side, admitted it was extremely improper, that a person claiming to be a creditor should act as a commissioner, but they contended it was through ignorance, and not with any improper view that *Fenwick* was named a commissioner, and that in the country, at a distance from London, the being a creditor was not generally known to disqualify a man from acting as a commissioner. That in the only case in print upon this point, *Ex parte Prosser (a)*, his Lordship had not superseded the commission, but permitted it to proceed. They therefore hoped, if they could establish the petitioning creditors debt, and the act of bankruptcy, the court would not supersede the commission.

THE LORD CHANCELLOR.

This petition to supersede the commission is presented upon three grounds. First, that there is not evidence of an act of bankruptcy having been committed. Secondly that there is not a valid petitioning creditors debt, and lastly that the commission has issued and has been dealt with in a manner that clearly shews there has

(a) 3 *Rose*, B. C. 370.

been an abuse of the authority of the great seal. This last question is one of great importance as it relates to the general administration of justice, and, if as it is represented, an opinion has gone abroad in the country, that creditors can be permitted to act as commissioners under their debtors commissions, it is highly necessary that the public should be correctly informed on that point.

1817.

Ex parte
STORY
—In the
Matter of
STORY.

One can hardly conceive how any person could entertain such an idea, and for my own part, I must say, that I have never met with any instance of its being acted upon in practice, except that case from Gloucestershire, (a) and which in fact happened through inadvertence; yet as it is stated at the bar to be a circumstance of frequent occurrence in the country, that creditors do act as commissioners, I have, with a view to prevent so great an evil for the future, delivered to the secretary a general order, framed with a view to meet the occasion. With respect to this case it has not the least resemblance to that cited, which was that of a commission, through mistake, happening to be addressed to a creditor. I there did not supersede the commission, but I made an order, by the force of which, the power devolved upon the other commissioners. But it is impossible for a moment in this case to suppose that the commission was addressed to *Fennick* through inadvertence. *Linskill Holland Fennick* and *Cockerell* sue out a commission against *Cornfoot* alone, on a debt due to them on the ship building account; in the affidavit and in the bond by them given to the great seal, there is not any mention made of *Story* as a co-debtor with *Cornfoot*. On the very

(a) *Ex parte Prosser*, 2 Rose B. C. 370.

There was also a case from the same court about the year 1817.

1817.
 Ex parte
 STORY
 —In the
 Matter of
 STORY.

paper that forms the docket, they give an order that the commission may be procured to be directed to *Fenwick*, one of the petitioning creditors, who made the affidavit and entered into the bond: on the 5th of August, *Linskill* arrests *Story* for a debt alledged to be jointly due from him and *Cornfoot*, for cordage and tackle supplied to the ship, to this action *Story* gives bail, then, *Linskill* thinking that it will be a more preferable way to resort to a commission, on the 20th of August sues one out against *Story* on the same debt. To this commission *Cockerell*, *Linskill's* partner in the ship building concern, is the solicitor, and he procures it to be addressed, as he had before done in *Cornfoot's* case, to *Fenwick*, another of the partners; *Fenwick* sits upon this commission through which *Linskill* *Fenwick* *Cockerell* and *Holland* are to work out their demand against *Story's* estate, and the commissioners, *Fenwick* being one of them, without any order for the purpose obtained from me, suffer *Linskill* *Fenwick* *Cockerell* and *Holland* to prove a joint debt to the amount of £1554 alledged to be due to them from *Story* and *Cornfoot* on the ship building account, and which seems to be the same debt they had before proved as a separate debt against *Cornfoot*; there are also separate debts to the amount of thirty or forty pounds proved, and joint debts to the amount of £2,000 including the £1554. *Holland* the remaining partner is chosen the sole assignee under this commission. It was *Cockerell's* duty as solicitor to the commission to attend to the interest of the separate creditors, and he ought not to have permitted the joint debt of himself and partners to have been proved. In short, it comes round to this, whether in a case, where one partner is the petitioning creditor, another an acting commissioner, another the solicitor to the commission, and the remaining one the sole assignee, who have acted in the manner I have before stated, the

commission can be permitted to stand, no sales having taken place, and the rights of innocent persons not being affected by any of the transactions under it. Let the commission be superseded.

1817.
~~~~~  
*Ex parte*  
STORY  
—In the  
Matter of  
STORY.

The question of costs was reserved to a future day.

On a following day, the Lord Chancellor had the proceedings in *Cornfoot's* commission brought to him in court, and upon looking into them he said. I see the commissioners have here also admitted the joint creditors to prove without any order. This serves to strengthen the opinion I gave in *Story's* case, where I directed the commission to be superseded. The petitioning creditor must pay the costs.



*Ex parte* LEVI.—In the Matter of SUTTON.

LINCOLN'S  
INN HALL,  
3 July, 1817

THE bankrupt had obtained his certificate, and this petition to surpersede the commission was presented on the ground that he was not a trader within the meaning of the bankrupt laws, and that the commission was a concerted one. The bankrupt was described in the proceedings as a ship owner, residing at Briddeley. It appeared that he was also an attorney and the town clerk of Colchester, where he had a house, and generally resided.

To supersede a commission after certificate allowed unless the invalidity appear upon the proceedings, a case of fraud must be made out.

Sir Samuel Romilly, Mr. Wetherell, and Mr. Horne for the petition, contended, that a ship owner could not be made a bankrupt, any more than the proprietor of a coach, or the owner of a waggon, and that the



1817.  
 ~~~~~  
Ex parte
 LEVI
 —In the
 Matter of
 SUTTON.

bankrupt being described as a ship owner of Briddlesey was a fraud, and done with a view to mislead creditors, who, seeing the advertisement in the gazette, would never suspect that it was the town clerk and attorney of Colchester, whose name they there saw amongst the list of bankrupts.

Mr. *Trower* for the bankrupt, and Mr. *Hart* and Mr. *Montagu* for the assignees, admitted, that a ship owner, merely as such, could not be made a bankrupt, but that he was described also in the proceedings as being a merchant, dealer, and chapman. They would not argue the fact of trading, as that was a question which could not come before the court upon a petition to supersede a commission after certificate, unless fraud was first proved. That the petitioner had not proved a single fact that tended to throw any doubt upon the fairness of the commission, for the circumstance of the bankrupt being described of Briddlesey, and not of Colchester, was not evidence of fraud, as that was the place where he carried on his trade of a merchant ship owner, and where he was generally known to reside to the full as much, as at Colchester,

THE VICE CHANCELLOR.

Unless it clearly appears upon the face of the proceedings, that the party declared a bankrupt is not a trader, the petitioner is precluded from going into evidence to disprove the fact of trading, without he can shew that the commission was fraudulent. The bankrupt is described in these proceedings, not merely as a ship owner but also as "dealer and chapman," which has been held sufficient to admit the finding of any particular trading (a). So that there is not any

(a) *Ex parte Herbert*, 2 Rose, B. C. 248.

CASES IN BANKRUPTCY.

79

patent invalidity apparent on the proceedings, and as the petitioner states a case of fraud which he has failed in proving, the petition must be dismissed with costs. (b)

1817.
} *Ex parte*
LEVI
—In the
Matter of
SUTTON.

(b) *Ex parte Crowder*, 2 Rose B. C. 324.

Ex parte PROSSER. } In the Matter of BROWN HIL. TERM.
Ex parte ——— } and others. 1817.

THE first of these petitions was to supersede the commission as having issued upon a concerted act of bankruptcy. An issue had been directed, and upon the trial (a) “several witnesses were called on the part of the plaintiff, who proved that on Monday the 22d of April, Smith the petitioning creditor called at the respective houses of the bankrupts, (each partner having a distinct residence) about nine o'clock in the evening; and each partner, though at home at the time, was ordered to be denied. It appeared likewise that the attorney of the bankrupts, who was also the attorney of the petitioning creditor, was at the house of each when the petitioning creditor called; there was likewise evidence that the attorney accompanied the petitioning creditor in his circuit to the house of each partner, that he went on a little before him, and prepared the bankrupt for his calling, when the servants were instructed to deny him. Another act of bankruptcy was relied upon, which was an assignment of all the effects of the bankrupts to their foreman, whose name was *Grist*, in consideration of five shillings. This deed was prepared by the attorney on the morning of the 22d of April, by the instruction of

Concerted
commission
superseded at
the costs of
the solicitor
and petition-
ing creditor.
If a commis-
sion is taken
out upon an
act proved at
the trial of an
issue to have
been concert-
ed with the
petitioning
creditor and
the solicitor,
the court will
supersede it,
and will not
direct another
issue to try
the validity
of the commis-
sion with
liberty to
prove other
acts.

(a) As reported 1 Holt. N. P. Rep. 442.

1817. "the bankrupts; they executed the deed, and *Grist*
Ex parte "the foreman signed it; but it was in evidence that
PROSSER "at the time *Grist* signed it, it was not read to him,
Ex parte "and he was ignorant of its contents. *Smith* the pe-
 —In the "titioning creditor was not privy to this deed, and did
 Matter of "not know of its existence till the opening of the com-
 BROWN "mission. This deed recited that the bankrupts had
 and others. "been denied to their creditors, *Croom* the attorney
 "however had advised *Smith* to take out a commission,
 "and when, upon this recommendation, *Smith* said
 "Though you know they have committed an act of
 "bankruptcy, how do I know it?" *Croom* replied,
 "They intend to shut themselves up in their houses,
 "and not to see a single creditor; I am now going to
 "them, and if you please you may call there also, and
 "see the state of things." *Croom* however stated,
 "that he never told *Smith* that the bankrupts would
 "be at home and denied; but he admitted, that when
 "*Smith* went with him he did not go with the ex-
 "pectation of obtaining any money; the petitioning
 "creditor and the attorney parted. After this conversa-
 "tion *Croom* went first to the house of *Morse*, and
 "then to the houses of the two *Browns*, when the
 "denial took place as above stated.—The jury found a
 "verdict for the plaintiff."

The other petition was presented in order to have another issue directed with liberty to the petitioners, to prove other acts than those that had been found concerted. (a)

The Lord CHANCELLOR.

When this petition was before me, I was desired to permit other acts to be proved at the trial than those

(a) The Reporter was not present at the argument.

CASES IN BANKRUPTCY.

79

complained of in the petition; which I refused; the issue has been tried, and a verdict found against the acts. An application is now made for a new trial, and that other acts may be proved. Upon looking into the proceedings, I see that other acts than those which were concerted may be substantiated. I agree to the case cited by Mr. *Bell*, which was in the bankruptcy of a person of the name of *Brown*, who was agent to the Duke of Northumberland. That commission was taken out upon a concerted act, but at the trial at law, evidence was admitted of other acts not concerted, and I agree to the proposition, that it is not necessary to give evidence at law of the particular act proved before the commissioners. But it is a very different question, whether the court, to which the jurisdiction in bankruptcy is entrusted by the legislature, will support a commission founded in a fraud practised upon the court. It has been said, that it would be extremely beneficial to all parties to let this commission proceed. I feel that; but I will not, on account of a particular inconvenience, give any countenance to a proceeding which the law binds me to say is illegal and fraudulent.

Let the commission be superseded with costs, to be paid by the petitioning creditor and the solicitor.

1817.

Ex parte
PROSSER,
Ex parte

—In the
Matter of
BROWN
and others.

LINC. INN *Ex parte* DAVIES.—In the Matter of DAVIES.
 HALL,
 July 30,
 1817.

A Commission issued against DAVIES, to which he had surrendered. On the forty-second day he attended a meeting of the commissioners to pass his last examination, which was concluded a quarter before five o'clock in the afternoon of that day, and he was arrested by a creditor that evening and carried to prison, where he had lain three weeks. He then presented this petition to be discharged at the expence of the creditor who caused him to be arrested, or of his attorney, or of one of them. There was conflicting evidence as to whether the bankrupt was or not returning home from passing his examination when he was arrested.

If a bankrupt pass his last examination on the forty-second day, the stat. 5 Geo. 2. c. 30. protects him from arrest during the whole of that day; but if the time had been enlarged beyond the forty-second day, *quære*, whether he would have been protected.

Mr. *Agar* and Mr. *Montagu* insisted, that he was entitled to his discharge either on the ground that he had been arrested when returning from his attendance upon a court of justice *Ex parte*, *List* (a). Or if his Lordship should think that fact not sufficiently established, then they contended that the statutable protection extended to the whole of the forty-two days, notwithstanding the last examination was completed before the expiration of the last day. *Ex parte*, *Donlevy*. (b).

Mr. *Wear* contra.

(a) 2 *Rose B. C.* 24.

(b) 7 *Ves.* 317.

The LORD CHANCELLOR.

If his last examination was on the forty-second day I think he is by the statute (c) protected during the whole of that day. I will not say what might have been the case if the time had been enlarged beyond the forty-two days. The order must be, that the plaintiff in the action do cause him to be forthwith discharged, which was the order I made in *Donlevy's* case, with a view to the protection of the sheriff.

1817.

Ex parte
DAVIES.—
In the
Matter of
DAVIES.

The question of costs stood over.

(c) 5 Geo. 2nd. c. 30. s. 5.

• *Ex parte* SOPPIT.—In the Matter of ROACH.

EASTER
TERM,
1817.

A Country commission had been superseded, and a new one had issued under the following circumstances.

The first commission issued on the 26th March, 1817, from that time till the 18th April a negotiation was on foot respecting an arrangement of the bankrupt's affairs, by way of a trust assignment, instead of resorting to the commission. That negotiation having failed, the solicitor to the commission would have opened it on the 18th April, but was not able to procure the attendance of the commissioners, but on the 27th day after the date of the commission, it was opened and the party declared a bankrupt. The usual advertisement was sent up to a solicitor in London to be inserted in the gazette, and as it is the practice at the gazette office not to insert such advertisements unless accompanied with a proper certificate from the bankrupt office, the solicitor, for the purpose of procuring the certificate, gave notice of the adjudication at the

If there be a bona fide intention to prosecute a commission, an advertisement in the gazette of the adjudication of the commissioners may be dispensed with; as where notice of the adjudication in a country commission was given at the bankrupt office on the 28th day, in order to obtain a certificate for the purpose of inserting the adjudication in the gazette, it was held to be sufficient to support the commission.

1817. bankrupt office on the 28th day after the date of the commission. The gazette was not published till some days after.

Ex parte
SOPPIT
—In the
Matter of
ROACH.

The petitioning creditor under the second commission having applied at the office, and not being able to get his commission as a matter of course, presented petition to supersede the first commission under the general order, (a) and that a new one might issue. He then gave a notice of motion according to the prayer of the petition, to the petitioning creditor of the first commission. The motion was made, and no one appearing to oppose it, the first commission was superseded, and a new one issued.

Sir Arthur Piggott and Mr. Treslove applied to the court to discharge the order of supersedeas, upon the authority of *Ex parte Freeman* (b).

Sir Samuel Romilly and Mr. Montagu opposed the application.

The LORD CHANCELLOR.

It is impossible to say there has not been much delay in prosecuting the first commission, but when that case which has been mentioned was before the court, an inquiry was made into the practice, and it was found not to be the practice, that nothing short of an advertisement in the gazette would satisfy the intention of the order where there was a bona fide intention to prosecute the commission.

Let the first commission stand.

(a) *Lord Rosslyn's*, 26th June, 1793, (b) 1 *Rose B. C.* 380. *Ves. and Bea.* 34 *S. C.*

Ex parte MAUNDRELL.—In the Matter of DARK, LINC. INN
HALL,
July 12,
1817.

THE petitioner was the lessor and the bankrupt the lessee of a farm for a term of nine years, commencing on the 25th March, 1815, at the yearly rent of £950, payable quarterly. The commission issued 7th March, 1817, and this petition prayed that the assignees might either accept the lease or deliver it up, together with the possession of the premises to the petitioner. The affidavits in support of the petition stated the indecision of the assignees when called upon to deliver up the lease. The assignees on the contrary, expressed themselves ready to deliver up the lease on the condition that they might take the off-going crops, pursuant to a covenant in the lease, which provided that the lessee should, "at the expiration, or other sooner determination of the lease," take the off-going crops from two thirds of the farm, and keep possession of one half of the barns, buildings, &c. for fifteen months afterwards. The affidavits of the assignees stated, that they had always declared their readiness to deliver up the lease on such conditions.

If a lease, containing a covenant that the lessee "at the expiration or other sooner determination of the term," shall take the off-going crop, is determined by the order of the Lord Chancellor in bankruptcy, under the 49 Geo. 3. c. 121. s. 19. the assignees are entitled to the off-going crop

Sir Samuel Romilly, Mr. Agar and Mr. Mathews insisted, on the behalf of the petitioner, that the assignees were bound to decide, whether they would or would not accept the lease without any stipulation or qualification whatsoever.

Mr. Hart and Mr. S. Cullen on the other side, contended for the right of the assignees to be informed by

1817.

Ex parte
MAUNDRELL
 —In the
 Matter of
DARK.

the court, before they came to any decision respecting the lease, whether in the event of their giving it up they would be entitled to the off-going crop.

They also argued, that it was clearly the intention of the legislature, as expressed by the 49th Geo. 3rd. c. 121. s. 10. that the Lord Chancellor should have the power to determine the lease, and that when it was so determined, such determination was included in and provided for by the terms of the lease; for that the expression "other sooner determination" shewed that the parties contemplated the possibility of the lease being determined by other acts, and not by the mere effluxion of time only; and in support of this argument they cited *Ex parte Nixon* in the matter of *Gough* (a).

THE VICE CHANCELLOR,

(After reading the case of *Ex parte Nixon*). It was stated at the bar, that there was no trace of this case to be found, after it was sent to the court of law. I have directed an inquiry to be made, and I find that the case was argued before the court of King's Bench in Hilary Term, 1814, and that the judges afterwards certified their opinion. By that certificate, (b) coupled with the statement of the case in Mr. *Rose's* Reports, it appears that a determination of a lease by an order of the Lord Chancellor upon a petition in bankruptcy, falls within the expression, "or sooner determination of the term." The case is therefore an authority that decides the main point in dispute between the present petitioner and the assignees; and the order I shall

(a) 1 *Rose Br C.* 445.

certificate. See the foot of

(b) The reporter has been favored with this case and

the present case.

make is founded upon an opinion, that the assignees are precisely in the same situation, as the tenant would have been had the lease expired by the effluxion of time. Let the assignees deliver possession of the farm and of the lease, they taking the crop to the extent the lessee would have been entitled if the lease had expired; and they must have temporary possession for the purpose of disposing of the crop, and let the rent be paid up to the time of possession being delivered.

1817.
Ex parte
MAUNDRELL,
 —In the
 Matter of
DARK.

In the Matter of GOUGH,

UPON hearing this petition on the 19th of August, 1813, the Lord Chancellor ordered that the assignees should deliver possession of the premises to the petitioner, and be restrained from carrying off the hay straw litter fodder dung manure and compost, then being or hereafter to be made or grow on the premises, and that a valuation should be made of the same without prejudice. And he ordered that a case should be made, stating a demise to A of Black Acre by lease containing the same covenants as the lease to bankrupt, and the determination of the lease by the effluxion of time, an admission of the possession of hay straw litter fodder dung manure and compost of the value of £50 by the lessor, and a question whether under the covenants the lessee is entitled to be paid for them or any and which of them. The same case also to state a demise to B of White Acre, under the

CASES IN BANKRUPTCY.

1817.
In the
Matter of
Gough.

like covenants, and the determination of this lease
an order of the Lord Chancellor on a petition in ba
krupcty under the statute of 49 Geo. III. c. 121.
like admission of the possession of hay straw fodd
dung manure and compost of the value of £50, and
question whether the assignees are entitled to be pa
for them or any and which of them.

A case was accordingly agreed upon, and was a
gued in the court of king's bench in Hilary Term
1814.

The following is a copy of the Judges' certificate.

" We have heard this case argued by counsel, and
" are of opinion on the 1st. question, that under t
" covenants stated, the lessee is not entitled to be pa
" for the hay straw litter fodder dung manure and cor
" post in that question contained, or for any of them.
" On the 2nd. question, we are of opinion, that und
" the covenant contained in the lease mentioned in t
" question, the assignees of B are not entitled to
" paid for the said hay straw litter fodder dung manu
" and compost, or for any of them."

18th February, 1814.

ELLENBOROUGH
S. LE BLANC.
I. BAYLEY.
H. DAMPIER.

Ex parte WHITTINGTON.—In the Matter of LINC. INN,
ADAMS. August 14,
1817.

THE bankrupt was tenant to Lady *Smythe* of a farm which he held from 25th March, 1815, for the term of one year, and so from year to year, as long as both parties should agree, determinable at any subsequent Lady-day on either party giving to the other a notice to quit on or before Michaelmas-day then next, and the bankrupt covenanted to spend, use, and consume on the premises all the hay straw dung manure and compost that should grow, be received, or collected, or be made thereon, and on quitting the farm to leave on the premises all such hay, straw, dung, manure, and compost for the use of the lessor her heirs or assigns, or her succeeding tenant.

If a lease is determinable upon notice at the will of the lessor or lessee and the lessee covenants to leave at quitting, the hay, straw, &c. on the premises; the bankrupt-
cy of the lessee and the election of his assignees not to take to the lease, have the same effect with reference to the covenant, as though the lessee had quitted upon notice.

In January, 1816, the stock and crop of the farm were taken in execution at the suit of one *Whitehead*, and the sheriff proceeded to sell the same.

Shortly after, a commission of bankrupt issued against *Adams* upon an act that overreached the execution. Under this commission the petitioners were chosen assignees. The assignees elected to abandon the lease. Lady *Smythe* presented her petition, praying that the assignees might be restrained from removing off the premises the remaining crops, and the hay, straw, &c. and that they might pay to her what they had received in respect of the crops, hay, straw, &c. sold under the execution. When this petition came on to be heard, it was ordered, that an account should be

1817. taken before the major part of the commissioners in
Ex parte the said commission named, of all sums of money re-
WHITTING- ceived by the said assignees, in respect of the hay
TON straw dung manure and compost sold from off the said
 —In the farm and premises, and that the said commissioners
Matter of should inquire whether any straw had been sold with
ADAMS. the corn in the ear, and ascertain the value of such
 straw, and that the said assignees should pay over all
 such money as they had received for hay straw dung
 manure and compost to the petitioner, and that they
 should proceed to recover all money due and outstand-
 ing in respect thereof, and pay the same, together with
 the value of such straw, as might have been sold with
 the corn in the ear, to the petitioner; and that they
 should be restrained from moving off the premises any
 hay straw dung manure and compost that might be
 then remaining or growing thereon, and that a valua-
 tion should be made of the crops growing upon the said
 farm, which were sold at the said sale, by two persons
 indifferently to be chosen by the petitioner and the said
 assignees, who were to be at liberty to call in a third
 person in case they did not agree, whose valuation
 should be final and conclusive, but in the making of
 which valuation the straw belonging to such crops was
 not to be included; and that the petitioner should take
 to the said crops at such valuation to be made as afore-
 said, and pay the same to the purchasers at the afore-
 said sale, and that it should be referred to *Mr. Stephen*,
 one of the Masters of the High Court of Chancery, to
 tax the petitioner's costs of that application, and that
 such costs when taxed should be paid by the said as-
 signees out of the estate of the said bankrupt *Thomas*
Adams, and any of the parties were to be at liberty to
 apply to his lordship as there should be occasion.

The assignees presented the present petition to have

he former one reheard, and further praying that the major part of the commissioners in the said commission named might be directed to inquire and ascertain what sum of money would be sufficient to purchase and bring on the farm a sufficient quantity of manure equal to what such hay, straw, and clover would have produced if spent on the said farm, as a compensation to the said Lady *Smythe* for the loss thereof.

1817.
Ex parte
WHITTING-
TON.
 —In the
 Matter of
ADAMS

Sir Samuel *Romilly* and Mr. *Heald* for the petition, contended that the determination of a lease by the assignees electing to give it up, was not a case provided for by the agreement between the lessor and lessee, as it only contemplated a determination upon notice, in which case the lessee would have time to consume with his cattle the hay grown upon the farm, and it would depend upon himself whether there would be any left at the expiration of the term.

Mr. *Hart* and Mr. *Benyon* for Lady *Smythe*, cited a case in the matter of *Gough*, (a) where the lessee covenanted to leave all the dung and compost upon the premises at the determination of the lease; he became a bankrupt, and his assignees having removed the hay and straw, they were ordered by the Lord Chancellor to pay the full value thereof, and not merely the value of the manure that would have been produced by consuming the hay and straw on the premises.

The LORD CHANCELLOR

Was of opinion that the determination of the lease by bankruptcy put the parties, with reference to the agreement respecting the hay crops, &c. precisely in the same situation as if it had been determined upon notice,

(a) See the case and certificate in that matter ante 65.

CASES IN BANKRUPTCY.

1817. and that as the court would have restrained the assignees from removing the hay crops, &c. so when they were removed by the execution it would make the assignees account for what they had received.

Ex parte
WHITTINGTON.
—In the
Matter of:
ADAMS. The petition was dismissed.

1817. *Ex parte* GRANT.—In the Matter of, RICHARDSON and another,
LANC. INN
HALL.
July 31.

Injunction granted to restrain an action of ejectment brought by a bankrupt at the instigation of the petitioning creditor, and another creditor, to recover the possession of premises sold under a commission acquiesced in for seven years.

THIS was the petition of the assignees to restrain *Richardson* the bankrupt, *Dudley* the petitioning creditor and *Morley* a creditor who had come in and proved his debt under the commission from proceeding in an action of ejectment commenced under the following circumstances: on the 6th March, 1810, the commission issued against *Richardson* and his partner, and they were declared bankrupts as horse dealers. The petitioner and another person were chosen assignees and the usual assignment made to them. The assignees employed *Richardson* as their agent, and when part of his estate was sold, soon after the bankruptcy, he procured a person to become the purchaser. The purchase money for the estate was paid and a dividend was made. The bankrupt pretending he had lately discovered that he ought not to have been declared a bankrupt, as he was not a trader, commenced an action of ejectment against the purchaser of the estate. There was evidence to shew that the bankrupt had offered to discontinue the action, provided he received a sum of money for so doing from the assignees.

It was alledged that *Sedgwick* and *Morgan*, two creditors who had not proved their debts were the persons at whose instance the ejectment was brought, but there was strong evidence to shew that in fact *Dudley* and *Morley* were the instigators of the action, which in the course of the argument, was admitted to have been commenced for the purpose of compelling the assignees to come to an account.

1817.
Ex parte
GRANT
—In the
Matter of
RICHARD-
SON and
another.

Sir *Samuel Romilly*, Mr. *Leach*, and Mr. *S. Cullen* for the assignees.

Mr. *Cooke* on the other side.

The LORD CHANCELLOR.

The object of this petition is to prevent the bankrupt from proceeding in an action commenced by him nearly seven years after his bankruptcy in order to obtain possession of an estate, for which in his character of agent to the assignees he had procured a purchaser.

In *Thompson's* case Lord *Thurlow* thought he could not give the relief prayed, upon petition in bankruptcy, but that a bill ought to be filed. Now it is quite clear that the court sitting in bankruptcy will not restrain a creditor from pursuing his legal remedy, if he has not come in under the commission. It is therefore necessary to note the difference between this case and *Thompson's (a)*. *Dudley* and *Morley* who have

(a) If a stranger avail himself of the jurisdiction, he must submit to it in all respects, and the court will enforce its order against him, *Pease Ex parte 1 Rose, B. C. 232.* But the Chancellor cannot attend to a petition presented by persons who have

1817:
Ex parte
GRANT
 —In the
 Matter of
RICHARD-
SON and
 another.

come in under the commission, lend their names to *Sedgwick* and *Morgan* who have not come in, for the purpose of calling a meeting of the commissioners, at which meeting, the attornies, who have brought this ejectment, attended as the attornies of *Dudley* and *Morley*. They are permitted to examine the proceedings for the purpose of preparing a petition to call upon the assignees to account. No petition is presented, but so soon as by these means the necessary information is procured, the ejectment is commenced. I have no doubt but that *Dudley* and *Morley* are the instigators of the action, which it is now pretended is brought for the purpose of forcing the assignees to account. If an application had been made by petition properly supported, by the bankrupt, or by any of the creditors, it would have been of course that the assignees should be compelled to account for what they had received, but instead of proceeding in the proper legitimate way, this action is brought, at the hazard of disturbing all that has been done under a commission acquiesced in for seven years and upwards.

Take the order to restrain *Richardson*, his solicitors, agents, and servants, from proceeding in the action, or permitting his name to be used for that purpose. I do not add the words, without prejudice to any application, for an account, as that would give countenance to the supposition that such a saving was necessary.

not come in under the commission unless it be by consent, though, if the parties consent, the court will enforce obedience to its orders, *Ex parte Hall*, 1 *Rose B. C.* 13, *Ex parte Rowton* 1 *Rose B. C.* 18, *Ex parte Burton* 1 *Rose* 320, and *Ex parte*

Allen infra.

Whatever is necessary to be decided collaterally to the point of proof will give the jurisdiction in bankruptcy. *Ex parte Rowton* 1 *Rose B. C.* 15, *Ex parte Pease* 1 *Rose B. C.* 232.

Ex parte SCHMALING.—In the Matter of
ALDEBERT and Co.

LINC. INN
HALL,
2 August,
1817.

THE petitioner, a merchant residing in London, claimed to prove a debt amounting to 32,533 florins, Dutch currency, equal to £3600 sterling, with interest, being the amount of duties, freight, premiums of insurance, warehouse rent, and other charges incurred in introducing at the bankrupts request, and for their account, 100 bags of cocoa into Holland during the existence of the French continental system, and afterwards in forwarding them in consequence of the rigorous enforcement of the French decrees through the German states to Austria, where, in consequence of the damage they had sustained during the carriage, and from other causes the cocoa became unsaleable.

A debt arising out of a contract to convey British goods to a market in an enemy's country, cannot be proved under a commission of bankrupt after peace has been established between that country and Great Britain. A petition to enforce a claim of proof ought to state the grounds of rejection by the commissioners.

The petitioner was employed by the bankrupts as their agent in these transactions.

Mr. *Heald* and Mr. *Rose* for the petition.

Sir *Samuel Romilly* opposed it on the ground that the demand arose out of an illegal transaction, namely, an attempt to carry on trade with an enemy's country in war time.

THE LORD CHANCELLOR.

I never knew that a debt arising out of an illegal contract for the purpose of trading with the enemy, could be enforced after peace was established between the two countries. If an action for money paid and expended, for the use of the defendants were brought, and it

1817.

Ex parte
SCHMALING
—In the
Matter of
ALDEBERT
and Co.

should turn out upon the trial that the plaintiff knew that the expences were incurred in forwarding goods to a market in a country at war with England, the action could not be maintained.

If there is any thing peculiar in this case, that may be thought to take it out of the general rule, it may be again mentioned.

The Lord Chancellor also took occasion to remark, that the petition did not state upon what grounds the commissioners rejected the proof of the debt, and that for the future he should expect, that petitions to enforce a claim of proof should state the grounds of the rejection by the commissioners.



LINC. INN
HALL,
2, August.
1817.

DIXON v. EWART.

A power of attorney to execute the indorsement of sale upon the register of a ship when she returns home is not revoked by the bankruptcy of the party giving the power.

IN this suit, upon a motion for an injunction, a question stood over to be argued arising out of the following facts.

Moffat and Co. make a mortgage of a ship at sea, and all the requisites required by the navigation acts, respecting the transfer of the property in ships when at sea are complied with, and they also give a power of attorney to a third person to execute the indorsement upon the certificate of register when the ship should return home. *Moffat* and Co. become bankrupts; and after the bankruptcy the ship returns home, and the person to whom the power of attorney is given, executes the proper indorsements upon the register within ten days after the ship's return.

CASES IN BANKRUPTCY.

35

The question was, whether the power of attorney given by *Moffat* and Co. was revoked by their bankruptcy?

1817.

DIXON

v.

EWART.

Mr. *Leach* for the motion.

In general a power of attorney is revocable, and may be determined at the pleasure of the party who gives it; but this general rule is subject to a qualification in cases where the power of attorney is given for a valuable consideration, and where a court of equity would compel the party giving the power to do the act himself, if the power were revoked at law. In all such cases the power is not revocable in equity at the will of the party giving it. Generally speaking, a power of attorney is revoked by bankruptcy, but this general rule also admits of a qualification similar to the former, for if the court would compel the assignees to do the act, the power is not revoked by bankruptcy, and in arguing this case I must admit, that if the party, when he became a bankrupt, could have been compelled to execute the indorsement, so might also his assignees. The question then comes to this.—Could these vendors, supposing no such power had been given, have been compelled by a court of equity to execute the indorsement themselves? This question has been determined in *Mestaer v. Gillespie* (a), where it was held that a court of equity had not the power to compel a party covenanting for the sale of a ship specifically to perform the agreement, and in *Speldt v. Lechmere* (b), the Master of the Rolls thought it could not be done even in a case of fraud.

(a) 11 Ves. 621.

(b) 13 Ves. 588.

1817. Sir Samuel *Romilly* and Mr. *Spence* opposed the motion. This case is not to be governed by those cited, for it is not that of a party covenanting to do a certain act, which may very well be held to fall within the policy of the statutes without touching this case, where all the circumstances to perfect the sale required by the legislature have been duly performed, and the indorsement actually made. The true question is, whether the bankrupt, by executing the bill of sale before his bankruptcy did actually vest in the vendee the property of the ship, subject to be divested if the indorsement were not made within ten days after the return of the ship. Powers of attorney are only revoked by the death or bankruptcy of the party where no estate or interest passes previous to the execution of the power, as in the case of a power of attorney to deliver seisen where the feoffer dies before livery made; *Co. Litt.* 52. b. But in the transfer of property in a ship, the indorsement is not the act by which the property passes; for in *Palmer v. Moxon* (a) the court of kings bench has determined the efficient act to be the bill of sale, and that act being completed, it can only afterwards be avoided, by not complying with the other requisites of the statute. In the 7th and 8th William 3rd. c. 22. s. 21. the expression is, that the sale shall be "acknowledged by indorsement," which shews it was considered by those who framed the statute, that the change of property took place previous to the indorsement, which change, it was thereby enacted, for the future should be acknowledged by the indorsement. The 26th. Geo. 3rd. c. 60. s. 16. does not alter the effect of the indorsement, any more than the 34th Geo. 3rd. that limits the time to ten days after a ship returns home. And none of the statutes consider the transfer of the property to take place upon the indorsement being made.

(a) 2 *Maule and Sel.* 43.

CASES IN BANKRUPTCY.

97

The LORD CHANCELLOR.

1817.

DIXON
v.
EWART.


It strikes me very forcibly that this case is similar to those under the annuity act, where a title passes for the 20 days allowed for the registering of the deeds; and I cannot but think the case determined in the court of kings bench (a) confirms that opinion, for it is very difficult to see how the court could there have given effect to the execution upon the doctrine of relation to the original act. I know it is impossible that a party could bring his case before this court within the time limited by the statute; but if the legislature had given twelve months instead of ten days, I should be very unwilling to say I could not compel an execution of the indorsement. The meaning of the legislature certainly must have been to give the party an inchoate title. Suppose I purchase a ship at sea, and within ten days after she returns into port, a creditor of mine puts a writ into the sheriff's court, how is he to act? After that decision in the court of kings bench, could he refuse to seize the ship?

The LORD CHANCELLOR. (b)

August 8th.

I have received a line from Mr. Justice *Abbott*, by which it appears that he and the Chief Justice of the common pleas are of opinion, that the interest in the ship is vested by the bill of sale in the vendee, subject only to be divested in case the indorsement on the certificate of registry is not made within ten days after the return of the ship into port. They are of opinion that no interest remains in the bankrupt, and that if the

(a) *Palmer v. Moxon*, 2 Maule and Sel. 43. (b) *Ex relations.*

1817.

 DIXON
 v.
 EWART.

indorsement is to be made by him, it is merely an act of duty, and passes no property; and so if a power is deputed by the bankrupt it may be exercised notwithstanding the bankruptcy. My judgment is agreeable to this opinion; but you may take a case, if you like.

LINCOLN'S *Ex parte* FOWLES.—In the Matter of NICKSON.
 INN HALL,
 Aug. 13th,
 1817.

Upon a petition to supersede a commission, the bankrupt's examination before the commissioners is evidence to shew the petitioner is not a creditor, although the petitioner was not present at the examination.

THIS petition was to supersede the commission.

Mr. *Benyon* took a preliminary objection, viz. that the petitioner had not proved himself to be a creditor of the bankrupt; for though he had so sworn in his affidavit, yet that was contradicted by the examination of the bankrupt before the commissioners.

Mr. *Agar* contended, that the examination was not evidence against the petitioner, who was not present when it was taken, as had been decided in *Ex parte Campbell* (a).

THE VICE CHANCELLOR

Thought the principle determined in *Ex parte Campbell* did not apply to the case before him, and therefore admitted the examination to be read, and it being found to contradict the affidavit of the petitioner, an enquiry was directed to be made before the commissioners as to whether the petitioner was or not a creditor.

(a) 2 Rose B. C. 51.

Ex parte BIRDWOOD.—In the Matter of SYM- LINCOLN'S
MONS. INN HALL,
August 15,
1817.

THIS was a petition to supersede the commission.

It was objected that the petitioner, since the petition had been presented, was become a bankrupt, and therefore rendered incapable of being heard upon such a petition, *Ex parte Ratray* (a).

THE LORD CHANCELLOR.

Let the assignees present a petition within three weeks from this time to have the benefit of this petition, and if they do not, let it stand dismissed.

The *Solicitor General* and Mr. *Montagu* for the petition.

Sir Samuel *Romilly* and Mr. *Cullen* for the assignees.

If a person presenting a petition to supersede a commission himself becomes a bankrupt before the petition is heard his assignees must present a supplemental petition to have the benefit of that already presented, or it will be dismissed.

(a) 1 *Cooke B: L. 7th Edit.* 519:

LINC. INN, *Ex parte* BOLITHO.—In the Matter of PETER
August 19,
1817. and ISAAC BLACKBURN.

If A and B are partners in a trade carried on in the name of A only, and A draws bills in his own name payable to his order, which he indorses, and afterwards B also indorses and procures them to be discounted, there is no legal contract for a holder to maintain an action against A and B upon the bills, unless it appear that A drew and indorsed the bills in the character of and as representing A and B.

A person discounting the bills may have a right of action against A and B jointly for money had and received if he can shew that they received the money by means of the bills for partnership purposes.

THIS petition, presented by joint creditors of the bankrupts, prayed that certain debts proved by the governor and company of the bank of England, and by Messrs. Down, Thornton and Free, might be expunged or struck off from the list of the debts of the joint estates of the bankrupts. It appeared that Isaac Blackburn carried on the business of a ship builder at Tan Chapel Dock, near Plymouth, in his own name, but that in fact Peter Blackburn was a secret partner with him, and that the capital of the ship building business belonged to both the bankrupts, but in different proportions, the proportion of Peter Blackburn much exceeding that of Isaac Blackburn, but they were equally interested in the profits of the concern. It also appeared that Peter Blackburn carried on the business of a general merchant in London, in his own name, and that Isaac Blackburn had not any interest therein. Isaac Blackburn kept a banking account in his own name at Plymouth, and Peter Blackburn kept a banking account at the house of Messrs. Down, Thornton and Co. in London, in his own name, and he had also a discount account in his own name with the bank of England.

The proofs of debts made by the bank of England and by Down, Thornton and Co. arose out of the following transactions. Isaac Blackburn drew bills of exchange in his own name upon his correspondents in London in favour of himself. These bills he indorsed, and when the bills were accepted, Peter Blackburn was in the habit of discounting them at the bank of Eng-

and, and with Messrs. Down, Thornton and Co's house, and when the bills were so discounted Peter *Blackburn* also indorsed them with his own name.

1817.

Ex parte
Boulton.
—In the
Matter of
Peter and
Isaac
Blackburn

The petitioners endeavoured to shew by the affidavits in support of the petition that the bills were drawn and the money raised for the accommodation of Peter *Blackburn's* separate trade. On the other side there was evidence, shewing that Messrs. Down, Thornton and Co. and some of the acceptors of the bills had knowledge of the partnership, and that they supposed the money to be raised by the bills was to be applied to partnership purposes.

The *Solicitor General* and Mr. *Cullen* for the petition. The bills are drawn by Isaac *Blackburn* in his own name, and are indorsed by him, and subsequently by Peter *Blackburn*, so that there is nothing upon the face of those instruments that raises a joint contract between the holders of the bills and the partnership of Isaac and Peter *Blackburn*. In order to make out a joint debt due from Isaac and Peter *Blackburn*, arising out of these bill transactions, to the holders of the bills, it will be necessary for them to establish two points.—First, they must shew that Isaac *Blackburn* was accustomed and authorized to draw and indorse bills in his own name as representing the partnership of Isaac and Peter *Blackburn*, for it is not sufficient in order to raise a contract between a partnership and a person discounting a bill drawn by one of the members of a partnership, for the discounter to shew that the proceeds were applied to the partnership account, and that he conceived at the time when the discount was effected that the bills were drawn on the partnership account. There must be something more. The discounter must

1817.
Ex parte
BOLITHO.
 —In the
 Matter of
 Peter and
 Isaac
BLACKBURN

prove a contract with the partnership firm, *Emly v. Lye* (a). But it is very difficult to conceive that such was the nature of these transactions, for if Isaac *Blackburn* drew the bills in favor of himself, not in his individual character but as representing the partnership firm, what occasion could there possibly be to require the indorsement of *Peter Blackburn*, if, as is represented on the other side, the discounter had knowledge of the partnership. Secondly, supposing it to be made out that Isaac *Blackburn* was accustomed to draw and indorse in his own name as representing the partnership firm, then it will be incumbent upon the holders of the bills to prove, either that they advanced the money upon the understanding, that the bills were partnership bills, or otherwise that the money so advanced was applied to partnership purposes.

Sir Arthur *Piggott* and Mr. *Cooke* for the Bank of England.

Mr. *Wetherell* and Mr. *Heald* for Down, Thornton and Co.

Mr. *Montagu* and Mr. *Teed* for the separate creditors contended, that as the bills were drawn in that name under which the partnership was carried on, the holder had a demand upon the partnership by force of the contract; as if a bill were drawn by Child's and Co. that would give a right of action to the holder against the house adopting that name, though there may not be a person of the name of Child in that firm

at this present time. But if that were not so, yet where one partner with the privity of the other draws bills in his own name, for the use of the firm, if a person advances money on the bills, although the partnership may not be liable jointly on the bills, yet it is liable as on account of the loan. *Denton v. Rodie* (a).

1817.
Ex parte
BOLITHO.
—In the
Matter of
Peter and
Isaac
BLACKBURN

Sir Samuel Romilly for the assignees.

The LORD CHANCELLOR.

Upon looking into the proceedings I observe there is a material difference in the manner in which the bank of England, and Down, Thornton and Co. have proved under the commission. The bank of England has proved as for a debt due for the residue of monies advanced upon the discount of the bills. Down, Thornton and Co. prove for money lent and advanced, and except the bills as a security. I have always understood the law to be, that if I take a bill to a bank and get it discounted but do not put my name to it, I am not liable on the bill, but an action for money had and received will lie against me. The question then is brought to this: whether these partners are liable by reason of the monies advanced, or by force of their names appearing on the bills; for if money is advanced to A and B, and the lender takes a bill from one of them only, he cannot maintain an action upon the bill against the two. Now if A and B are partners, and also separate traders, and A draws a bill and indorses it in his own name, and B also indorses it, and they become bankrupts, what is there to prevent the holder of a bill from proving against the separate estate of

1817.
Ex parte
BOLITHO.
 —In the
 Matter of
 Peter and
 Isaac
BLACKBURN

each of them? And unless you can shew that when A drew the bill he drew it not as A but as A and B, there can be no legal contract upon the bill as against the two. There may be a right of action, if you can bring it to this, that the money was raised by A and B for partnership purposes. It is impossible for me upon these affidavits to decide between the parties. The case must be sent to a court of law for its determination.

Issues were directed whether the bankrupts were jointly liable upon all or any of the bills. And whether they were jointly liable as for monies lent and advanced. The articles of partnership to be given in evidence. Both bankrupts to be examined. And not to set up the bankruptcy.

TRIN. TERM *Ex parte* **KILNER.**—In the Matter of **KILNER.**
 1817.

THE bankrupt's father had, on the 1st. July, 1816, assigned all his estate and effects under a deed of trust to his brother and his nephew. On the 31st. of August following, the bankrupt also assigned for the benefit of his creditors, all his estate and effects to four trustees, two of whom were the trustees under the father's deed of trust. Within ten days after the execution of the last mentioned deed the father sued out a commission of bankruptcy against the son, and the act of bankruptcy was the execution of the deed to the four trustees. A, at the instance of his trustees, sues out a commission of bankruptcy against B, the act relied upon being B's assignment. Held that the commission, being that of A's trustees, who were proxies and parties to B's deed of assignment, could not be supported.

tees. It was admitted, that the commission was in fact that of the father's trustees.

1817.

Ex parte
KILNER.
In the
Matter of
KILNER.

The petition was to supersede the commission.

Sir Samuel Romilly and Mr. Barber for the petition.

The act relied upon is the execution of the deed by the bankrupt to trustees for the benefit of his creditors; But the parties who have caused this commission to be sued out are not in a condition to take advantage of that act. The Lord Chancellor has determined, that where a person was present at a meeting of creditors of an insolvent called for the purpose of entering into an arrangement respecting his estate, if that person, standing by and looking on, tacitly countenanced what was done at the meeting, he could not be permitted to sue out a commission upon the act which he had so sanctioned. But here the case is much stronger; for the persons at whose instance this commission issues, not only assent to the assignment, but are parties trustees to the deed by which the assignment is to be made effectual.

Mr. Leach and Mr. Rose in support of the commission. It cannot be pretended, upon any evidence before the court, that the trustees under the father's deed of assignment executed that of the son, in any other way than in their individual characters. The son being indebted to the father, it is thought to be the most advantageous mode that can be adopted for the benefit of the father's estate, that a commission should issue against the son. This is done upon the father's petition; for as the legal right to sue for the debt was in

1817. him, he alone, and not the trustees, could be the
Ex parte petitioning creditor. But if it is admitted that it was
KILNER. the duty of the father's trustees to advise and direct
 In the a commission to issue against the son, in order to ob-
 Matter of tain payment of the debt due to the father's estate, the
KILNER. court will put the most favourable construction upon
 what they have done, and will not impute to them,
 without any evidence, conduct which would be a
 breach of trust.

The petition stood over, with liberty to the parties
 opposing the petition to file affidavits, for the purpose
 of explaining that they accepted the office of trustees
 under the deed executed by the bankrupt, in their
 individual character, and not as trustees under the
 father's assignment.

Some further affidavits having been made, the
 petition stood for judgment.

The VICE CHANCELLOR. (a)

It is quite clear, upon the face of the deed of assign-
 ment by the younger *Kilner*, purporting to be an
 assignment of all his estate and effects, that it consti-
 tutes an act of bankruptcy, but then that act cannot
 be taken advantage of by parties and privies to the
 deed; and the only question is, whether the exe-
 cution of that deed by the father's trustees would pre-
 vent him taking out an execution, for if he could not
 take out an execution he could not be a petition-
 ing creditor in bankruptcy. It is said that the trustees
 did not execute the son's deed of assignment as

(a) The judgment *Ex relatione*.

trustees of the father, but in their individual capacity; and it is not disputed, that if the father had executed the deed himself he could not have sued out a commission. Admitting that to be the law, how does the case then stand with reference to the father's trustees? Every beneficial interest in his estate is transferred to them: they were to be permitted in his name to do every act for the purpose of recovering his debts, and were to sue in his name, so that every act to be done for the benefit of the father's estate was to originate with them. But then they are also trustees under the son's deed, and one of their duties will be to pay to themselves what is due from the son to the father; in short it appears to me that they stand precisely in the place of the father, and as the father, if he had been a party to the son's deed, could not have sued out a commission, so they being in point of law identified with the father must be subject to the same rule.

1817.
Ex parte
KILNER.
—In the
Matter of
KILNER.

Let the commission be superseded.

GENERAL ORDER

In the Matter of Bankruptcy.

Wednesday, June 11th, 1817.

LORD CHANCELLOR:

It is ordered, that from and after Monday, the 16th day of June next, no petition struck out of the Vice Chancellor's paper of petitions on account of non attendance, be restored to the paper without an order being made by his Honor the Vice Chancellor, upon petition for that purpose, or be placed in the Lord Chancellor's paper, except by order made upon petition.

1817.

GENERAL ORDER

In the Matter of Bankruptcy.

July 25th, 1817.

Lord CHANCELLOR:

I do hereby order, that from and after the first day of September next, upon all applications for commissions of bankruptcy, requesting that the commission may be directed to persons named, the solicitors in delivering to my secretary of bankrupts, the names of the commissioners to be inserted in the commission, do at the same time certify, that, according to the best of their knowledge and belief, none of the said persons, intended to be commissioners, or a commissioner, are or is in any manner creditors, or a creditor of the intended bankrupt.

ELDON C.

LINC. INN *Ex parte* BRINE.—In the Matter of BUDGETT. (a)
HALL,
18 August,
1817.

A petition-
ing creditor
who with the
knowledge of
two or three
of the credi-
tors, received
his debt from
the bankrupt
held to have
forfeited it
under the 5
Geo. 2. c. 30,
s. 24.

THE Lord Chancellor having looked into the affidavits, expressed his opinion that *Brine* was not aware of the legal effect of the transaction in which he had engaged; his lordship therefore permitted the commission he had sued out to proceed, and all further directions were reserved till further order.

(a) See the case stated ante 19.

The petition now came on to be heard, as to repayment of the £266 received by *Parsons*.

1817.

Ex parte
Baish.
—In the
Matter of
Bunnett.

Sir Samuel *Romilly* and Mr. *Rose* for the petition.

Mr. *Montagu* for the respondents.

The Lord CHANCELLOR.

I do think this is an extremely hard case, for I firmly believe, that all the persons who were engaged in this transaction, were ignorant of the legal consequences attending the payment of a petitioning creditor's debt by the bankrupt, but the statute is imperative, and I must declare the debt forfeited.

With respect to the costs of the petition, the petitioner must have them out of the estate, and I make that order with a view to mark my opinion of this being an extremely hard case against the petitioning creditor to the first commission.



Ex parte MORGAN:—In the Matter of HIGGENS. LINCOLN'S
INN HALL,
22 August,
1817.

AN objection was taken to this petition presented by assignees, that it was not signed as required by the general order (a). It appeared that only one of the

A petition presented by assignees, must under the general order, 12 Aug. 1809, be signed by all who present it, and not by one only as in the case of partners.

(a) Lord *Eldon's* order 12th August, 1809. The language of the order is "all petitions in bankruptcy presented for hearing, shall before they are presented, be respectively signed by " the petitioners, except in " cases of partnership, or absence from the kingdom, in " the former of which cases the " signature of one of the partners is to be deemed sufficient."

1817: assignees had signed the petition, and it was contended that the exception in the order, in favor of partners, did not extend to assignees; who are not liable for the acts of each other.

Ex parte
MORGAN
—In the
Matter of
HIGGENS.

The Lord Chancellor thought the objection well founded, and the petition stood over with liberty to amend the signature.

Mr. *Cooke* for the petition.

Sir Samuel *Romilly* for the respondent.



LINCOLN'S INN HALL,
August 22,
1817.

Ex parte **LAW.**—In the Matter of **OAKDEN.**

THIS was a petition to compel a solicitor (who was not the bankrupt's solicitor) to produce to the commissioners a deed of assignment made by the bankrupt, the execution of which was the act of bankruptcy sought to be established. The solicitor had appeared before the commissioners, but he refused to produce the deed.

If a solicitor not being the bankrupt's solicitor, has in his custody a deed of assignment executed by the bankrupt, he must produce it if required so to do by the commissioners.

Sir Samuel *Romilly* for the petition.

Mr. *Wetherell* opposed it.

On the subject of costs he urged, that it was a very common mistake for persons to suppose that they ought

not to produce deeds of this nature, without the order of the court to the commissioners.

1817.

Ex parte
LAW.
—In the
Matter of
OAKDEN.

The Lord CHANCELLOR.

I am afraid, Mr. *Wetherell*, your client has no excuse for not producing the deed when required so to do by the commissioners. If it had been the case of the solicitor of the bankrupt, under whose advice the deed had been executed, he would have been justified in not producing it, without the authority of the court (a).

Let the solicitor produce the deed before the commissioners, and let him pay the costs of this petition.

(a) *Ex parte Treacher ante 17.*

Ex parte NEALE.—In the Matter of NORTON.

LINC. INN
HALL,
Aug. 20th,
1817.

THIS was a petition to tax the solicitor's bill of costs.

It appeared that the costs up to the choice of assignees, amounted to £100, and to £500 within the first ten months after suing out the commission. The bill of costs had been sent to the office of Master *Morrice*, for the purpose of being taxed, and several warrants had issued for attendances to tax the bill, one of the assignees was present in the master's office upon the taxation, but before it was completed, Master *Morrice* died without having signed the certificate. After his

Solicitor's
bill of costs
where the
charges were
prima facie
exorbitant,
ordered to be
taxed, after
payment
made and af-
ter the death
of the assignee
who had paid
it.

1817.

Ex parte
NEALE.—In the
Matter of
NORTON.

death nothing further was done in the office, and the assignee paid the bill.—Sometime afterwards the assignee died, and upon his death new assignees were duly chosen, who presented this petition, praying that the bill might be taxed, and that if upon such taxation it should appear that the charges were too great then that the solicitor might refund what had been paid to him by the former assignees.

Mr. Montagu for the petition.

Sir Samuel Romilly and *Mr. Collinson* for the solicitor, cited the case of *Cooke v. Settree* (a), to shew that after payment made, the court will not order a taxation, unless gross errors or fraud are shewn; and they insisted that as the bill had been paid voluntarily by the former assignee, the solicitor could not be called upon to refund by the present assignees. That whether the former assignee could charge the payment to the estate was quite another question, and did not admit of discussion upon this petition.

The Lord CHANCELLOR

Was of an opinion that the fact of new assignees being interposed, was not any bar to the taxation of the bill, and that the circumstance of £109 being charged before the choice of assignees, would of itself be sufficient to order a bill to be taxed after payment made.

The bill of costs was ordered to be sent back to the same office to be taxed, not disturbing what should appear to have been done on the former taxation.

(a) 1 *Vesey and Beam* 126.

Ex parte ROBINSON.—In the Matter of NUNN LINCOLN's
and BARBER. INN.
August 20.
1817.

NUNN and BARBER had been in the habit of employing B to get bills, which he had not indorsed, discounted for him; B in order to effect the discount, indorses them. Held that A's estate must relieve B's from the liability incurred by the indorsements. delivering to *Watson and Company* Bills of Exchange for the purpose of procuring them to be discounted; *Nunn and Barber* did not indorse the bills, but *Watson and Company* indorsed them when the discount was effected, and they paid the money so raised over to *Nunn and Barber*. The petitioner, who was the assignee of *Watson and Company*, insisted that the transaction was to be considered as a loan, and that the estate of *Nunn and Barber* was indebted to the estate of *Watson and Company* to the amount of the monies paid by them in respect of the bills that were dishonored. On the other hand it was said by the assignees of *Nunn and Barber*, that the transaction was merely the common case of a purchase of bills, and that *Nunn and Barber's* estate could not be liable to make good any part of the advances made upon bills subsequently dishonored, and upon which their names did not appear.

Sir Samuel Romilly and Mr. Cullen for the petition.

Mr. Bell and Mr. Wray, for the assignees of *Nunn and Barber*.

1817.

Ex parte
ROBINSON.
 —In the
 Matter of
NUNN and
BARBER.

The LORD CHANCELLOR.

The simple case appears to be this. *Nunn* and *Barber* say to *Watson* and Company go and get these bills discounted for us, which they do, and put their own names upon them. Now if I agree with a person to get bills discounted for me, and he does not put his name upon them, the money he gets upon the bills is money had and received to my use, but if he put his name upon them and I were to bring an action against him for what he had received, I could not recover unless I shewed that I had relieved him from the liability he had incurred by indorsing the bills in order to effect the discount. So in this case *Nunn* and *Barber's* assignees have a right to say, it is our money you received; but then they must relieve *Watson's* estate from the liability incurred by the indorsement.

Refer it to the commissioners to state what sum if any ought under the circumstances to be proved by *Watson* and Company, with liberty to state any special circumstances, and the petitioner to be at liberty to go in and make a claim for the sum of £3914 : 9 : 0, and let a dividend be reserved to that amount (*a.*)

(a) "If a man has a bill payable to him or bearer, and he delivers it over for money received, without indorsement of it, this is a plain sale of the bill, and he who sells it does not become a new security," per Holt, C. J. *Bank of England v. Newman*, 1 *Ld. Raym.* 442. 12 *Mod.* 241. 1 *Comyn.* 57. S. C. *Fyddell v. Clark*, 1 *Esp. N. P. C.* 447. Nor can the money advanced in respect of the bill be proved under the bankruptcy of the

Ex parte DICKEN.—In the Matter of DICKEN· LINCOLN'S
INN.

August 27,

1817.

BY indentures of lease and release of the 4th. and 5th. days of May 1802, made between the bankrupt of marriage of the bankrupt in 1809, the estate of the wife, consisting of freehold, copyhold and leasehold lands, where conveyed to the use of the bankrupt and his heirs, who covenanted with the trustees within six months after the marriage, to pay to them £4000 upon the trusts of the settlement. The trustees never demanded payment. In 1806 the bankrupt sold part of the freehold premises, and he and his wife levied a fine of the whole, declaring the uses of that part which was sold to the purchaser, but without making any declaration as to the remainder. In 1812 the bankrupt conveyed all his estates to trustees for the benefit of his creditors. In 1813 the bankrupt covenanted that he and his wife would levy a fine to the uses declared in the deed of 1812, and a fine was levied accordingly. The wife never surrendered the copyhold premises pursuant to the settlement 1802. In 1814 the commission issued, and the husband was declared a bankrupt, his execution of the trust deed 1812 being the act of bankruptcy.

The trustees of the settlement proved the £4000 under the commission and signed the bankrupt's certificate. Held that the trustees on behalf of the wife and children of the bankrupt, had a lien upon the estates thereby conveyed and remaining unsold by the bankrupt to the amount of the £4000.

person delivering it with out indorsement. *Ex parte* Shuttleworth, 3 Ves. 368. but see *Ex parte* Hustler infra. If the person who sends a bill into the market know it to be a bad one, it should seem he will be liable though he do not indorse it. See 3 T. R. 759. Chitty on bills, 3rd. edition, 124.

If the holders of a bill circumscribe the authority of an agent employed to get cash for it, by telling him they will not indorse it, he cannot make his principals liable beyond the scope of

such limited authority. *Fenn v. Harrison*, 3 T. R. 757. Contra if the authority given is general, *Fenn v. Harrison*, 4 T. R. 177. and see what Kenyon, C. J. says respecting the case of *Fenn v. Harrison*, 1 Esp. N. P. C. 449.

Whether the transfer of a bill be a sale or a discount is a question of intention and open to evidence. *Ex parte* Isbester, 1 Rose, B. C. 20. and see the cases collected, Chitty on bills 123. and *Ex parte* Hustler, infra.

1817.
Ex parte
DICKEN
 —In the
 Matter of
DICKEN.

the 1st. part, the petitioner then Ann *Jones* of the 2nd. part, and Richard *Fitzherbert* and the petitioner Richard *Meek* of the 3rd. part, reciting that Ann *Jones* was entitled unto an estate of inheritance in fee simple in the freehold premises therein described, and to certain leasehold premises therein also described, and was likewise seized in fee simple according to the custom of the manor of Abrewas, in the county of Stafford, of the copyhold lands, tenements and hereditaments therein also described and covenanted to be surrendered, and was also possessed of and entitled to a considerable personal estate. All which said freehold, leasehold, copyhold, and personal estate, amounted together in value to the sum of £4000 or thereabouts, and upon the treaty for the said intended marriage, the said Ann *Jones* had agreed to convey and assign all the aforesaid freehold and leasehold premises unto Richard *Fitzherbert* and Richard *Meek*, their heirs, executors, administrators, and assigns, to and for the several uses intents and purposes thereafter limited, expressed and declared of and concerning the same, and to covenant with the said bankrupt, his heirs and assigns, to surrender the said copyhold lands, tenements and hereditaments unto and to the use of the said bankrupt, his heirs and assigns as thereafter mentioned. In consideration whereof the said bankrupt agreed to pay to the said Richard *Fitzherbert* and Richard *Meek*, or the survivor of them, his executors or administrators the full sum of £4000, of his own proper monies as thereafter mentioned, upon the trusts therein mentioned. It was witnessed, that in consideration of the said intended marriage, and for settling, conveying and assuring the freehold premises thereafter mentioned, upon the several uses, trusts and purposes thereafter limited, the said Ann *Jones* did grant unto the said Richard *Fitzherbert* and Richard *Meek*,

and their heirs and assigns, the said freehold premises to hold unto the said Richard *Fitzherbert* and Richard *Meek*, their heirs and assigns, to the use of the said *Ann Jones*, her heirs and assigns, until the solemnization of the said intended marriage, and from and immediately after the solemnization thereof to the use of the said bankrupt, his heirs and assigns for ever. And it was further witnessed that for the considerations aforesaid, the said *Ann Jones* did grant and assign unto the said Richard *Fitzherbert* and Richard *Meek*, the said leasehold premises to hold unto the said Richard *Fitzherbert* and Richard *Meek*, their heirs, executors, administrators, and assigns, for and during all the estate of the said *Ann Jones* therein, to the use of the said *Ann Jones* until the solemnization of the said intended marriage, and after the solemnization thereof to the use of the said bankrupt, his executors, administrators and assigns. And the said *Ann Jones* did thereby for herself, her heirs, executors and administrators, covenant, promise and agree to and with the said bankrupt, his heirs and assigns, that in case the said intended marriage should take effect then that the said *Ann Jones* and her heirs would at the next general or some subsequent court baron, to be held in and for the manor of Abrewas, within 12 calendar months next, immediately after the solemnization of the said intended marriage, surrender the copyhold premises therein described, and all other the copyhold hereditaments of her the said *Ann Jones*, within the manor of Abrewas, to the use of the said bankrupt, his heirs and assigns for ever, at the will of the lord according to the custom of the said manor. And it was further witnessed that for the considerations aforesaid, and for making some settlement and provision of maintenance for the said *Ann Jones*, in case she should happen to survive the said bankrupt her intended husband, and

1817.
Ex parte
DICKEN,
—In the
Matter of
DICKEN.

1817.

Ex parte
DICKEN.
 —In the
 Matter of
DICKEN.

for making some provision for the issue of the said intended marriage, the said bankrupt did thereby for himself, his heirs, executors and administrators, covenant and agree with the said Richard *Fitzherbert* and Richard *Meek*, their executors and administrators, that in case the said intended marriage should take effect, the said bankrupt, his heirs, executors or administrators should and would within six calendar months, immediately after the solemnization thereof, pay or cause to be paid unto the said Richard *Fitzherbert* and Richard *Meek*, or the survivor of them, his executors or administrators the sum of £4000 upon the trusts thereafter mentioned, that is to say, upon trust to place the same out at interest, and pay the interest to arise thereupon to the said bankrupt, and his assigns for life; and after his decease, to pay the same to the said Ann *Jones* and her assigns for life, if she should survive her said intended husband, for her, and their own use and benefit as and for and in full of the jointure of the said Ann *Jones*, and in lieu, bar, and full satisfaction of all dower and thirds or freebench which the said Ann *Jones* could or might at any time have or claim, and after the decease of the survivor of them the said bankrupt and Ann *Jones* to pay the said sum of £4000 unto and among the children of said marriage, as the said bankrupt and Ann *Jones* should jointly appoint, and in default of such joint appointment as the survivor should appoint, and in default of any such appointment, equally among such children.

The marriage was afterwards had, and there was issue of such marriage several children, the other petitioners. By indentures of lease and release, bearing date the 1st. and 2nd. days of January, 1812, the said bankrupt conveyed and assigned all his freehold, leasehold and personal estate and effects, and also cove-

anted to surrender his copyhold estate to Messrs. *Mosley* and *Hoskins*, upon trust for the benefit of his creditors.

1817.

Ex parte

DICKEN.

—In the
Matter of
DICKEN.

By indenture bearing date the 6th, day of July, 1813, made between the said bankrupt and the petitioner *Ann Dicken* of the one part, and the said *Ashton N. Mosley* and *Abraham Hoskins* of the other part, reciting the said trust indentures of lease and release of the 1st. and 2nd. days of January, 1812. It was witnessed that, for the further, better, more perfectly and effectually limiting, and assuring all and singular the said hereditaments and premises, comprised and mentioned in the said indentures of lease and release, to the use of the said *A. N. Mosley* and *Abraham Hoskins*, upon the trusts and for the end, intents and purposes, and under, and subject to the powers, provisoes, declarations and agreements thereafter mentioned, expressed and declared or referred to, of and concerning the same, and for barring and extinguishing all dower and right and title of dower or other right, title or interest, whatsoever of the said *Ann*, the wife of the said bankrupt, of, in, to or out of all the same hereditaments and premises, the said bankrupt for himself, his heirs, executors and administrators, and for the said *Ann* his wife, covenanted that he and *Ann* his wife would levy one or more fine or fines unto the said *Ashton N. Mosley* and *Abraham Hoskins*, and the heirs of the said *A. N. Mosley* of the premises comprised in the said recited indentures of lease and release. And it was declared that the said fine should enure to the use and behoof of the said *A. N. Mosley* and *Abraham Hoskins*, and their heirs and assigns for ever, nevertheless upon such trusts for such ends, intents and purposes, and under and subject to such powers, provisoes, declarations and agreements, as are in the said

1817.
Ex parte
DICKEN.
 —In the
 Matter of
DICKEN

recited indenture of release mentioned and expressed; concerning the real estates of the said bankrupt thereby directed to be sold or upon and for such and so many of the said trusts, intents and purposes as were then existing and capable of taking effect.

A fine was levied in pursuance of the said covenant; and in the mode directed by the said last mentioned indenture.

On the 15th. day of November, 1814, a commission of bankrupt issued against *Joseph Dicken*, under which he was duly found and declared a bankrupt, and the act of bankruptcy upon which the same was grounded, was the conveyance of the 2nd. January, 1812.

The copyhold premises belonging to the said *Ann Dicken* before her marriage, had not been surrendered pursuant to the covenant entered into by her with the said *Joseph Dicken*, by the indenture of settlement of the 5th. day of May, 1802, and there remained unsold of the freehold property, about two acres of land, the remainder having been sold by the said bankrupt.

The bankrupt had never paid the sum of £4000 to the trustees, pursuant to his covenant contained in the said indenture of settlement, and the said sum of £4000 was proved by the surviving trustee under the commission.

The assignees proceeded under the commission to sell parts of the said freehold and leasehold hereditaments and premises.

The petition was presented by the wife and children of the bankrupt, and the surviving trustees under the

settlement, and it prayed that the assignees might be ordered to proceed to a sale under the commission, of all the freehold, copyhold and leasehold estates, lands and hereditaments; comprised and included in the said settlement of the 4th. and 5th. May, 1802, then remaining unsold, and that the proceeds to arise by the sale thereof, as well as the proceeds which had been received by the assignees, for the sale of the parts of the lands and hereditaments already sold by them, might thereupon be applied in the satisfaction and discharge of the said sum of £4000, and might be paid into the hands of the petitioner the surviving trustee, to be laid out and invested by him upon the trusts of the said settlement, and in case the proceeds to arise from the sale should be found insufficient to pay the said sum of £4000, then that the trustee might be at liberty to prove for the residue under the said commission.

1817.
Ex parte
DICKIN.
—In the
Matter of
DICKIN.

The parties also agreed to admit the following facts at the hearing of the petition, namely.—

That in the year 1806, the bankrupt having sold the premises at Uttoxeter, comprised in the indentures of the 4th. and 5th. May, 1802, to one John Bailey *Madely*, it was agreed that he and his said wife should levy a fine thereof to the use of the purchaser, and as the said bankrupt then intended shortly afterwards to sell the remainder of the freehold hereditaments comprised in the said indentures, it was agreed that in order to save the expence of levying another fine, that the whole of the freehold hereditaments comprised in the said indentures should be included in the fine, to be levied to the said John Bailey *Madely*, and accordingly the said bankrupt and his wife did in *Trinity Term*, 1806, levy a fine of the whole of the hereditaments comprised in the said indentures of the 4th. and 5th. May, 1802,

1817.

Ex parte
DICKEN.—In the
Matter of
DICKEN.

unto the said John Bailey *Madely*, and it was declared that the said fine as far as related to the premises purchased by the said John Bailey *Madely*, should enure to the use of the said John Bailey *Madely* and his heirs and assigns, but no declaration was made of the uses of the said fine as to the remainder of the lands comprised therein.

That the whole of the said hereditaments and premises comprised in the said indentures of the 4th. and 5th. *May*, 1802, were sold and conveyed by the said bankrupt, and the purchase monies received by him previously to the trust deeds of the 1st and 2nd *January*, 1812, except certain hereditaments and premises, part whereof was freehold, and part copyhold.

That the trustees named in the said indentures of the 4th. and 5th. *May*, 1802, never applied to the bankrupt for the payment of the sum of £4000 therein mentioned previously to his bankruptcy, and that they proved the same under the said commission of bankrupt issued against him, and signed the certificate.

Sir Samuel *Romilly*, and Mr. *Wingfield*, for the petition, argued that the husband before his bankruptcy could not, nor could his assignees by whom he was represented, take the benefit of the settlement without performing the contract on their part. That the fine levied by the bankrupt's wife in pursuance of the deed, 6th. *July*, 1813, was altogether nugatory inasmuch as it was levied to the uses mentioned in the deed, 2nd. *January*, 1812, but the execution of that deed was the act of bankruptcy, and upon the issuing of the commission the deed, as a conveyance, became void, and therefore it was the same as though a fine had been

levied and no uses declared thereof. They also contended that whatever might be the effect of the fine as regarded the wife, yet that the children of the marriage could neither be prejudiced by that, nor, by any act which the trustees of the settlement might have done.

1817.

Ex parte

DICKEN.

—In the
Matter of
DICKEN.

Mr. *Hart* for the assignees, admitted the general rule, that a purchaser has a lien upon the estate for his purchase money, but he contended that the case was not analogous to that of a purchaser, as the husband had six months after the marriage took place to pay the £4000, and that if he had sold the property the day after the marriage, as he might have done, the purchaser could not have objected to the title on the score of the lien of the £4000. That it must be admitted there was not any lien immediately after the marriage, and it was contrary to the nature and definition of a lien that it should for a length of time lie dormant, and then become operative upon the estates. He also contended that as the trustees had proved the debt and signed the certificate, concealing the claim of lien, that it was now too late for them to insist upon the equities of the wife and children, who must be barred by the act of their trustees.

The LORD CHANCELLOR.

Supposing there was an original lien upon the estates nothing has passed to take it away from the children. With respect to the copyhold estates, I think it clear that there was a lien and that nothing has been done by which the lien has been removed. The question as to the freehold property is one of greater difficulty, but after giving the best attention I can to the subject, I also think there is a lien upon the freehold. As to the fine levied by the wife, it cannot bind those interested in the money.

1817. His Lordship made the following order .

Ex parte
DICKEN.
—In the
Matter of
DICKEN.

“Now upon hearing the said petition read, and what
“was alledged by the counsel for the several parties, I
“do declare that the petitioner *Richard Meek* the sur-
“viving trustee in the settlement of the 5th. *May*, 1802,
“is entitled on behalf of the petitioners *Ann Dicken*
“and her children, *Joseph Dicken*, *Mary Dicken* and
“*Ann Dicken*, to be considered in equity, as having a
“lien upon the freehold and copyhold estates mentioned
“in the settlement, and which remained unsold at the
“time of the bankruptcy of the said *Joseph Dicken* the
“father, for the sum of £4000, by the said settlement
“covenanted to be paid by the said *Joseph Dicken*, the
“father to *Richard Fitzherbert*, now deceased, and the
“petitioner *Richard Meek*, in trust for the benefit of the
“said *Ann Dicken* and her issue, and it being admitted
“that such unsold estates will not be sufficient to pay the
“said £4000, I do also declare that the said *Richard*
“*Meek* is entitled on behalf of the said petitioner *Ann*
“*Dicken* and her issue, to stand as a creditor for so
“much of the £4000 as the unsold freehold and copy-
“hold estates shall be insufficient to pay, and to receive
“dividends thereon rateably with the other creditors of
“the said *Joseph Dicken* the father out of his estate,
“and I do hereby refer it to the commissioners to sell
“the said estates, and let the produce thereof be first
“applied in payment of the costs and charges of and
“attending the said sale, and the surplus thereof be ap-
“plied as far as it will extend in satisfaction of the said
“sum of £4000, and let the proof already made by the
“said *Richard Meek*, be varied and stand for such sum
“as shall be the amount of such deficiency, instead of
“the sum of £4000, which has already been proved,
“and let the said *Richard Meek* out of the money, which
“he shall receive as the clear amount of the purchase

“ money from the said sale, after deducting the costs,
 “ charges and expences, pay all parties their costs of
 “ this petition and of the order thereon, such costs to
 “ be taxed by Mr. *Harvey*, one of the Masters of the
 “ Court of Chancery, if the parties differ about the same.
 “ And let the petitioner *Ann Dicken* concur in such con-
 “ veyance and surrenders of the freehold and copyhold
 “ estates, as shall be necessary to convey, surrender and,
 “ assure the said unsold freehold and copyhold estates to
 “ the purchasers. And in case any of the purchasers of
 “ any parts of the estates which were unsold by the said
 “ *Joseph Dicken* the father, before his bankruptcy shall
 “ require any releases of the right or claims of the said
 “ *Ann Dicken*, thereon the said *Ann Dicken* at the
 “ costs and charges of the persons requiring the same,
 “ is to execute all reasonable and proper releases in that
 “ behalf.”

1817.

Ex parte
DICKEN.

—In the
 Matter of
DICKEN.

Ex parte ROSS.—In the Matter of *FISHER*:

MIC. TERM.
 1818.

ROSS and *TWYXCROSS* were partners at the *Cape of Good Hope*, and in the month of *September*, 1814, *Fisher* consigned to them one hundred pipe, packs, or shooks (a) twenty-seven bundles of iron hoops, and one bag of rivets, with directions to send him twenty-five or thirty pipes of wine, and so on in succession by quantities of twenty-five or thirty pipes

A has a joint demand against B and C, who are also creditors of A. B by letter having made himself separately liable to A, on account of the demand originally joint, cannot if and C. be entitled to the

either at law or in equity set off the joint debt due from A to himself. If a party neglect to plead a legal set off to an action, he is no assistance of a court of equity to give him the benefit of the set off.

(a) A shook was described pipe staves as would make a to be a bundle of so many pipe.

1817.
Ex parte
Ross.
 —In the
 Matter of
 FISHER.

by different ships, as opportunity offered. The wine to be contained in pipes made of the shooks so consigned to them. *Ross* and *Twycross*, in *February*, 1815, consigned to John *Ansley* twenty-five pipes of wine, with instructions to deliver them to *Fisher* upon his paying for them. *Fisher* not being able to pay for the whole took away ten pipes, which he paid for. *Ross* and *Twycross* afterwards sold the remaining seventy-five shooks, *Fisher* having, as was alledged; but which he denied, countermanded the order for the wine. In *March* 1815 *Ross* and *Twycross* dissolved partnership; at which time *Ross* wrote to *Fisher* in the following terms: "As Mr. *Twycross* declines "joining me in shipping any more wines for you I "shall take out the remainder of your shooks, and "when a favorable opportunity offers, and wines fall "in price, which I have every reason to hope will be "about June or July next (as the present vintage is "very fine) I will purchase and ship for you; but I "must again repeat, that I expect you will be pre- "pared to put Mr. *Ansley* in cash on receipt of in- "voice." A commission of bankrupt issued against *Fisher* 2nd *July*, 1816, and after the issuing of the commission *Ross*, who was then in *England*, gave *Fisher* notice, that unless he took away and paid for the 15 pipes of wine, he should sell them on *Fisher's* account, and the same were accordingly sold in *August*, 1816. *Fisher's* assignees brought an action of assumpsit against *Ross* to recover the proceeds of the 75 shooks; to this action *Ross* pleaded his partnership with *Twycross* in abatement. When the action came on to be tried *Ross's* letter of *March* 1815 was given in evidence, and the jury under the direction of the judge found a verdict for the plaintiffs. The court of common pleas, after hearing the case argued, refused to grant a new trial, upon which *Ross* presented the

present petition, praying that the assignees might be restrained from issuing execution upon the judgment, and that the debt due from the bankrupt on account of the fifteen pipes of wine might be set off against what *Ross* had received as the proceeds of the shooks, or if not, that a sum of £64 admitted to be a separate debt due from the bankrupt to *Ross* might be set off against the demand for the shooks.

1817.
Ex parte
Ross.
—In the
Matter of
FISHER.

Mr. *Hart* and Mr. *Montagu* contended for the petition on two grounds. First, that the petitioner had a legal set-off, and that he ought not to be prejudiced by having through mistake pleaded the abatement instead of the set-off, or secondly, that if he had not a set off at law further than the £64, yet that he had one in equity to the amount of the 15 pipes of wine. In support of the first point, they cited *Billon v. Hyde*, (a), and *Taylor v. Okey* (b). As to the second, they argued it must be understood from the nature of the transaction and from the letter of *March*, 1815, that if *Ross* took upon himself as his separate debt, the amount of the proceeds of the 75 shooks, he was to have the benefit of the consignment made on the bankrupt's account.

Mr. *Bell* and Mr. *Roupell*, for the assignees.

The LORD CHANCELLOR.

Fisher's assignees have brought this action against *Ross*, and he is advised to plead in abatement, by that plea he suggests to the court that he is not the sole debtor. If the debt be both joint and several, the plea

(a) 1 Ves. 326.

(b) 13 Ves. 180.

1817.
Ex parte
Ross.
 —In the
 Matter of
Fisher.

cannot be supported. The action comes on to be tried and the jury under the direction of the judge find debt to be a separate one. This verdict would be correct, if in their supposition the debt were joint as well as separate. An application is made to the court Common Pleas for a new trial, which is refused, the defendant not being satisfied, brings a writ of *ex parte* without making any offer to pay the debt deducting £64, and then he applies to this court saying that he has either a legal or an equitable set off. But if the petitioner thought proper to plead in abatement instead of pleading a set off, is he to be allowed to come here to have his misleading set right after having tried every other chance? I recollect Lord *Tenison* refused to give a party the benefit of a legal set off which he had neglected to plead at law. I do not see any equitable circumstances in the case that entitle the petitioner to the relief he prays; for when *Fisher* sends the casks to the cape of Good Hope, he sends them as articles to be employed in the conveyance of the wine ordered, and not as articles of merchandise so that he had never any demand against *Ross* or *Twydross* as a debt. But *Ross* and *Twydross* are creditors in the strict sense of the word of *Fisher* for the amount of the wine. This being so, the partnership is dissolved, and *Ross* informs *Fisher* that *Twydross* will have nothing further to do with the order and that he *Ross* will take to the casks, but how does that make the debt due to *Ross* and *Twydross* a separate debt to *Ross*? (a).

(a) The construction of the statutes of set off. 2 Geo. 2. c. 22. 8 Geo. 2. c. 24. is the same in equity as at law. 11 *Ves.* 27. *Bishop v. Church* 3 *Atk.* 691. *Ex parte T. good*, 11 *Ves.* 517. but the being enabling statutes

It being stated to the court that it was clearly understood by all parties at the trial of the action, that the £64 should be set off, His Lordship said he would give the petitioner leave to make a further affidavit as to that fact. But unless he could shew that he had tendered the amount of the judgment, deducting the £64, that he must pay the costs of the petition.

1817.
Ex parte
Ross.
—In the
Matter of
FISHER.

Ex parte INMAN, } In the Matter of INMAN. MIC. TERM
Ex parte WOOD, } 1817.

THE bankrupt had presented a petition to have the bill of costs of *Wood*, the solicitor to the commission, taxed. *Dawkins* and another, the assignees of the bankrupt, also presented a similar petition to have their costs taxed. The petitions were heard together, and one order only was drawn up, but the order purported to be a reference to tax the bankrupt's costs, and also a reference to tax the assignees costs. The master reported he had taxed both bills, and reduced that of the assignees more than one-sixth; that of the bankrupt less than one-sixth. It also appeared that the whole amount of the reduction exceeded one-sixth of the whole amount of the bills delivered.

Held that a solicitor must pay the costs of the taxation of his bill reduced by the taxation more than one sixth of the amount, which reduction arose from the master disallowing extra fees paid to the commissioners for travelling expences.

do not defeat or control the original jurisdiction of courts of equity in cases where there would have been an equitable set off previous to the statutes, as on the ground of fraud. *Ex parte Stephens*, 11 Ves. 24. or to prevent circuity of action. *Ex parte Hanson*, 12 Ves. 346.

1817.

Ex parte

INMAN.

Ex parte

WOOD.

—In the
Matter of

INMAN.

The reduction of one-sixth in the charges made to the assignees arose from the solicitor having charged a sum of money which he had paid to the commissioners as extra fees for travelling expences.

The bankrupt and the assignees now presented a petition stating the facts, and praying for their costs of the taxation of both bills, and a reference to the master to tax them.

Wood the solicitor presented a cross petition, insisting that he ought not to pay the costs of the taxation.

Sir Samuel *Romilly* for the bankrupt and his assignees.

The Solicitor General and Mr. *Ross* for the solicitor contended, that the statute was not imperative upon the Lord Chancellor sitting in bankruptcy, and that if an item in a bill consisted of a charge which strictly speaking a solicitor could not make, yet if there were nothing unfair or inequitable in it, his Lordship would not visit him with costs.

That the courts of law always made a distinction between items in a bill consisting of improper payments and such as consisted of improper charges made by the attorney for his own work and labour—*White v. Milner*, (a) That here the solicitor had made the payment in his own wrong, and it would be very hard if in addition to the loss he must sustain on account of such payment, he were made to pay the costs of the taxation.

(a) 2 *H. Black*, 357.

That at all events he ought not to be made to pay the costs of taxing the bankrupt's bill, as the order of reference clearly shewed it was the intention of the court that it should be wholly unconnected with the taxation of the assignees bill, and the report was evidence that the order was so construed by the Master.

1817.
Ex parte
INMAN.
Ex parte
WOOD.
—In the
Matter of
INMAN.

The LORD CHANCELLOR.

These must certainly be considered as separate bills, for it seems the convenience of the parties was the reason of one order only being made, and the Master to whom it was referred has treated them as separate and distinct bills. I do not agree to the proposition, that this court sitting in bankruptcy has a discretion to relax the rule, as to payment of the costs of the taxation of a solicitor's bill, for if the practice has been adopted by analogy to the statute, the statute then becomes as much the fixed law of this court as of any other in Westminster Hall. (a) I think the master was perfectly right in disallowing the charge of extra fees to the commissioners; for how can such a charge be a proper one when the legislature has said, that if a commissioner accept of more than his 20s. he shall be disqualified from ever acting again as a commissioner. (b)

The solicitor must pay the costs of taxing the bill of the assignees, but not that of the bankrupt, and as his own petition was unnecessary, let him also pay the costs of that.

(a) 2 Geo. 2nd. c. 23 s. 23. (b) 5 Geo. 2nd. c. 30. s.
Ex parte Westall, 3 Ves. 42.
and Bea. 141.

MIC. TERM *Ex parte* LEIGH.—In the Matter of BISTON.
1817.

Petition to expunge a charge of collusion made in another petition, and to be heard before that petition dismissed with costs. That other petition coming on to be heard and the charge of collusion being unfounded it was dismissed with costs as against the party so charged.

A PETITION had been presented in this bankruptcy to supersede the commission, containing an allegation that the commission was fraudulently issued by I. K. in collusion and concert with the bankrupt, together with J. P. the private solicitor both of the bankrupt and of the said I. K. and with Thomas *Leigh*. This petition was to have the former one taken off the file, or that the allegation of fraud might be expunged, and to have this petition heard before the other. The petitioner by his affidavit denied that the commission had issued in collusion and concert with him. He stated that he had examined the affidavits filed in support of the petition to supersede the commission, and that they did not support the allegation of fraud.

Mr. *Hart* and Mr. *Rose* for the petition.

Sir Samuel *Romilly* and Mr. *Cullen* opposed it.

The LORD CHANCELLOR.

I have no doubt of the courts power to expunge scandalous and impertinent matter from its proceedings, wherever such matter may be found. The difficulty is to discover in each particular case, what is scandal; but one thing is clear, that nothing can be scandal that is not at the same time impertinent. It is impossible to say, if there were nothing more than appears upon the petition itself, that the allegation complained of is scandal, but there is this difference in proceedings in bankruptcy and in a cause; in a cause you

do not get at the evidence till it is ripe for hearing, whereas in bankruptcy affidavits may be filed as soon as a petition is presented. Now what is the evidence here? The petitioner says, he has examined the affidavits made in support of the petition, and he is of opinion they do not support the allegation. But the question cannot be decided upon such evidence. The Chancellor must hear the petition which contains the matter complained of, and he must himself decide whether the commission was or was not concerted and collusive. It does not unfrequently happen that gentlemen at the bar come to different conclusions from the same facts respecting concert and collusion; and I have also known a similar difference of opinion take place on the bench. I therefore cannot support this petition. But I agree that if a clear case of scandal is made out, the court will expunge the irrelevant matter; and I also wish it to be understood that the court will not suffer petitions to be made a vehicle for scandal; and that it has both the power and the will to punish parties who thus misuse its proceedings.

1817.
Ex parte
LEIGH.
—In the
Matter of
BISTON.

The other petition to supersede the commission coming on to be heard a few days afterwards, the Lord Chancellor was of opinion that the charge against Mr. Leigh was unfounded, and therefore ordered the petition to be dismissed as against him with costs, but as there was no precedent of such a petition as that presented by him, it was dismissed with costs.

The order so far as it relates to the petitioner Leigh, was as follows.—

“ Now upon hearing the said petitions read, and
“ what was alledged by the counsel for the said parties,
“ do declare the charges of collusion in the said first

1817.

Ex parte
LEIGH—In the
Matter of
BISTON.

“ petition made against the said Thomas *Leigh*, to be
 “ unfounded ; and therefore I do order that the said
 “ first mentioned petition presented to me by the said
 “ Richard *Dixon* and others be, and the same is
 “ hereby dismissed as against the said Thomas *Leigh*
 “ with the costs, to be taxed by Mr. one
 “ of the Masters of the Court of Chancery, should
 “ the parties differ about the same, and to be paid to
 “ the said Thomas *Leigh* by the petitioners, after de-
 “ ducting therefrom, the costs to be paid to them by
 “ him in respect of the second petition as after men-
 “ tioned, &c. &c. And I do order that the second
 “ petition presented to me by the said Thomas *Leigh*
 “ be, and the same is hereby dismissed with costs, and
 “ that the said costs as also all the preceding costs be
 “ taxed by the aforesaid Master, should the parties
 “ differ about the same.

MIC. TERM *Ex parte* **HOBBS.**—In the Matter of **TANNER.**
1817.

Renewed
commission,
on the petition
of a creditor,
the bankrupt,
the commis-
sioners, and
the assignees
being dead.

THIS was a petition for a renewed commission, the bankrupt and all the commissioners were dead. The original assignees had been discharged and a new one chosen in their stead. The new assignee had been dead about three years. The petitioner proved his debt in the year 1799.

Mr. *Tinney* for the petition, which was not opposed.

THE LORD CHANCELLOR.

Take the order and let the new commission be executed in London. As to the costs of this petition, that

question must stand over till after the new commission has issued. (a).

1817.

Ex parte.
HOBBS.
—In the
Matter of
TANNER.

BAINBRIDGE v. PINHORN.

ROLLS.
18 Dec.
1817.

THIS was a bill for a foreclosure, the mortgagor having become a bankrupt. The assignees by their answer admitted the mortgage, the bankruptcy and the assignment, but they insisted that no bargain and sale of the bankrupt's real estate had been made to them by the commissioners.

A bill of foreclosure against the assignees of a bankrupt mortgagor before the execution of the bargain and sale by the commissioners will not be dismissed on the ground that the assignees have not any interest that can be the subject of a foreclosure.

The bankrupt was not made a party to the suit.

Sir Samuel Romilly and Mr. Pepys for the plaintiff, insisted that notwithstanding the bargain and sale had not been executed, yet, as the assignees had a right to call upon the commissioners at any time to execute it, they had such an interest as might be the subject of foreclosure, or otherwise the assignees would have it

(a) 5 Geo. 2nd. c. 30. s. 45. “of the commissioners named
“And he it further enacted “in such commission, so
“by the authority aforesaid, “that a sufficient number of
“that no commission of “commissioners shall not be
“bankrupt shall abate by “living who can act therein,
“reason of the death of his “or for any other cause, in
“present Majesty, (whom “every such case, such com-
“God long preserve) his “mission shall be renewed,
“heirs or successors, but “and but half of the fees
“such commissions shall “usually paid upon granting
“continue in full force, and “or obtaining of commis-
“if it shall be necessary to “sions of bankrupt shall be
“renew any such commis- “paid for any such renewed
“sion, by reason of the death “commissions.”

1817. in their power at any time to defeat the plaintiff's foreclosure.

BAINBRIDGE

v.

PINHORN.

Mr. *Buck* contended that the defendants, the assignees, had not any interest in the mortgaged premises, and therefore the bill ought to be dismissed with costs. It had been determined at law that the enrolment of the bargain and sale did not relate back to the act of bankruptcy; and where an ejectment had been brought by assignees upon a demise by them laid subsequent to the bankruptcy but previous to the enrolment of the bargain and sale, it was held the action would not lie. (a) That a court of equity would give the same effect to the bargain and sale with reference to equitable interests, as the courts of law had done as to legal estates. That if the bargain and sale were executed at any future time it would not relate back so as to give the assignees an interest at the present time, and therefore a fortiori, the mere right to call for the execution of the bargain and sale could not give them any present interest.

The MASTER of the ROLLS.

If the assignees have not any interest in the estate then the mortgagee will not perfect his title by foreclosing them.

The usual decree of foreclosure was made. (a)

(a) In an ejectment upon a special verdict the case was that commissioners of bankrupt had assigned by indenture the lands in question to the lessor of the plaintiff, which indenture was afterwards enrolled, but the declaration was upon a demise made after the indenture and before the enrolment, and whether the demise were sufficient to entitle the lessor of the plaintiff was the question.

Ex parte **BOGEN.**—In the Matter of **BOGEN.** LINC. INN.
Jurid. December.
 1817.

A PETITION had been presented in this matter to supersede the commission, and upon its being heard the Vice Chancellor ordered that the parties should proceed to a trial at law in the court of common pleas at the sitting after Michaelmas term, upon the two

Upon an order to proceed to trial upon two issues, to try the validity of the commission, the plaintiff to give notice in writing to the bankrupt of the acts intended to be relied on at the trial. Held that the petitioner in his notice must specify the acts relied on, the times when they were committed, and the witnesses who will be called to prove them.

It was compared to the case of a bargain and sale enrolled pursuant to the statute of Henry 8th. where the enrolment relates back to the date of the deed. But the court held it would be very inconvenient to admit of relation because no time was prefixed for the enrolment, and judgment was given for the defendant. *Perry v. Bowes.* 1 Ventris, 360.

An assignment of a term of years was made by commissioners of bankruptcy to a creditor, who before enrolment of the deed of assignment made a lease to the defendant, and then the deed was enrolled, Per. Cur. Such a lessee cannot maintain an ejectment because the lease could not have been before the enrolment. The words of the statute are "that the commissioners may sell by deed enroled," so without enrolment no sale. *Elliot v. Danby.* 12 Mod. 3.

And in a very late case where an ejectment the demise was laid after the act of bankruptcy, but before the bargain and sale, the action was adjudged ill. The court refusing to extend the doctrine of relation to the conveyance by the commissioners of the bankrupt's freehold. *Doe. d. Esdaile v. Mitchell,* 2 Maul. and Selw. 446. In this last case the court is reported to have said that the freehold remained in the bankrupt, though not beneficially, until taken out of him by the conveyance. 2 Maul. and Selw. 447.

21 J. 1. c. 19. s. 13. &c. It was for some time doubted whether under this section, the assignee should have the benefit of an equity of redemption. *Vandenanker v. Desbrough.* 2 Vern. 96. but afterwards the assignees were allowed to redeem. *Hitchcock v. Sedgwick,* 2 Vern. 156. *Pope v. Onslow,* 2 Vern. 286.

1817. following issues, "Whether the said John Louis Bogen
Ex parte "was bankrupt within the true intent and meaning of the
 BOGEN. "several statutes made, and now in force concerning
 —In the "bankrupts, some or one of them at the date and suing
 Matter of "forth of the said commission." And secondly "whether
 BOGEN. "there was a good and valid debt due to the said Wil-
 "liam Davidson as petitioning creditor under the said
 "commission at the date and suing forth of the same,
 "sufficient to support the said commission." And it was
 further ordered that the said William Davidson, should
 within the first fourteen days of Michaelmas Term
 give notice in writing to the bankrupt or to his solicitor,
 of the act or acts of bankruptcy intended to be by him
 relied upon at the trial of the said issues, and if the
 said act or acts of bankruptcy was, or were a denial
 to any creditor or creditors of the said John Louis
 Bogen, to state by and to whom by name he was so
 denied, if the witness or witnesses could state the
 same, but if the witness could not state, then the best
 description the witness or witnesses might be able to
 give, and the time when as near as the witness or wit-
 nesses could fix the same. In pursuance of this order
 the plaintiff furnished the bankrupt with a notice of
 the acts intended to be relied on at the trial, which
 were as follow.—

The plaintiff means to insist and give in evidence
 at the trial of this issue, that the defendant did before
 the date and issuing forth the commission against him
 commit the following acts of bankruptcy, namely,
 that Susannah Ellis, a female servant in the employ of
 the defendant, in pursuance of instructions given by
 the defendant, did on some day between the 17th. and
 30th. days of *January*, 1816, but which day in par-
 ticular, the witness cannot set forth, answer the door
 bell, when one Mr. Taylor, a Bricklayer, who had

been employed on the premises, presented himself, and was told by the said Susannah *Ellis*, that the said defendant was not at home; and the said Mr. *Taylor* then went away without seeing the said defendant, although he was then in the house.

1817.
Ex parte.
BOGEN.
—In the
Matter of
BOGEN.

That the said Susannah *Ellis* in pursuance of the said instructions did between the 30th. day of *January*, and the 2nd. day of *March*, 1816, but on which day in particular the witness cannot set forth, again deny the said defendant to the said Mr. *Taylor*, when the said defendant was at home.

That the said Susannah *Ellis* did in pursuance of the aforesaid instructions on some day between the 12th day of *January*, and the 2nd. day of *March*, 1816, but on which day in particular the witness cannot set forth, deny the said defendant to Mr. *Whitby*, a Corn-chandler, who resided in the neighbourhood, and served the said defendant and his family, when the said defendant was at home.

That the said Susannah *Ellis* in pursuance of the instructions given, did on some day between the 12th. day of *January*, and the 2nd. *March*, 1816, deny the said defendant to a Blacksmith, whose name witness does not remember, but who was a creditor of the said defendant (and who resided in the neighbourhood) when the said defendant was at home.

That the said Susannah *Ellis* in pursuance of the instructions, and between the last mentioned periods, but on what day in particular she cannot set forth, did deny the said defendant to a man dressed in every respect like a gentleman, but whose dress and figure the witness does not more particularly remember, who

1817. either said he came with a bill for payment or ~~an~~
^{and} receipt for money, which he was to call for, but ~~which~~
Ex parte in particular witness does not remember, the said de-
Boehm. fendant then being at home.
 —In the
Matter of
Boehm.

That the said defendant was denied by his request to Mr. *Haslam*, an agent for the *Shrewsbury* estate, by *George Willoughby*, a gardener in the employ of the said defendant, between the 16th. day of *March*, and the first day of *May*, 1816.

That the said defendant was denied at his request by the nurse in the family of the defendant to the aforesaid *William Taylor* and Mr. *Whitby*, between the 12th. day of *January*, and the 2nd. day of *March*, 1816.

That the said defendant began to keep house between the 12th. day of *January* and the 1st. day of *May*, 1816, whereby the aforesaid Mr. *Taylor*, Mr. *Whitby*, Corn-chandler, the gentleman who called for payment of a bill, or had brought a receipt, and a gentleman who represented himself as agent of the landlord, and the collector of taxes, severally creditors or some, or one of them, was, or were delayed.

That the said defendant did absent himself from his dwelling house, on one or more occasion or occasions by sleeping abroad, between the first day of *January*, and 2nd. of *March*, 1816, with the intent and for the purpose of avoiding his creditors, dated the 27 day of *November*, 1817.

The bankrupt conceiving this notice to be defective, presented a petition that *Davidson* the plaintiff in the issue might be ordered forthwith to deliver a further

and full and amended notice and particular, specifying the particulars of the act and respective acts of bankruptcy, on which the said William *Davidson* intended to rely on the trial of the said issues, and particularly the time and respective times when the said acts respectively were committed, and the names and description of persons to whom the alledged denials were made, and of the persons who were or are supposed to have been delayed or avoided or intended to have been delayed or avoided by the petitioner's supposed keeping his dwelling house, or absenting himself from his dwelling house, as is alledged in the notice of the said William *Davidson*. When this petition came on to be heard, the Lord Chancellor was of opinion, that the bankrupt ought not to be harrassed by being put at the trial, to negative all the acts mentioned in the particular. Upon this intimation of his Lordship's opinion, the petitioner in the issue agreed to specify one or two acts on which he would rely, and accordingly gave to the bankrupt the following amended notice.

1817.
Ex parte.
Bogen.
 —In the
 Matter of
Bogen.

That Susannah *Ellis*, a female servant in the employ of the defendant in pursuance of instructions given by the defendant, did on some day between the 17th. and 23rd. day of *January*, 1816, but on which day in particular the witness cannot set forth, answer the door bell, when one Mr. *Taylor*, a bricklayer, who had been employed on the premises, presented himself, and was told by the said Susannah *Ellis* that the said defendant was not at home, and the said Mr. *Taylor* went away without seeing the said defendant, although he was then in the house.

That the said Susannah *Ellis*, in pursuance of the said instructions, did on some day between the 25th.

1817. *February*, and 2nd. *March*, 1816, but on which day in particular the witness cannot set forth, again deny to the said defendant to the said Mr. *Taylor*, when the said defendant was at home.

Ex parte.
BOGEN.
 —In the
 Matter of
BOGEN.

That defendant was denied between the last mentioned periods, to the said Mr. *Taylor* by Sarah *Preston*, the nurse in defendant's family.

That the said Susannah *Ellis*, did in pursuance of the said instructions on some day between the 20th. and 27th. *January*, 1816, but on which day in particular the witness cannot set forth, deny the said defendant to Mr. *Whitby*, a cornchandler, who resided in the neighbourhood, and served the said defendant and his family, when the said defendant was at home.

That the said defendant was denied to the said Mr. *Whitby*, within the last mentioned periods, by the said Sarah *Preston*.

That the said Susannah *Ellis* in pursuance of the aforesaid instructions, and between the 25th. *February*, and 2nd. *March*, 1816, but on which day in particular she cannot set forth, did deny the said defendant to Lieutenant Colonel *Jones*.

That the said defendant was denied to the said Lieutenant Colonel *Jones*, by George *Willoughby*, the defendant's gardener, on some day between the 25th. *February*, and 2nd *March*, 1816.

That the said defendant was denied to Mr. *Haslam*, an agent for the *Shrewsbury* estate, by the said George *Willoughby*, between the 16th. *April*, and 1st. day of *May*, 1816.

That the said defendant did absent himself from his dwelling house, by sleeping abroad; between the 25th. *January*, and 3rd. day of *February*, 1816, with the intent and for the purpose of avoiding his creditors.

1817.
Ex parte.
BOGEN.
—In the
Matter of
BOGEN.

Sir Samuel Romilly and Mr. Montagu for the petition.

The Solicitor General and Mr. *Horne*, for the assignee, argued that the notice was sufficiently explicit, and that it was not necessary to draw it up so particularly as though it were directions for a special issue. That the persons to prove the acts, were servants of the bankrupt, and unwilling witnesses, and that it would be too much to expect of the plaintiff, who was merely the assignee, to be more explicit in a case where all his knowledge of the circumstances was to be collected from such witnesses, and where it respected transactions that had passed within the walls of the bankrupt's own house.

The LORD CHANCELLOR.

Upon looking into the proceedings, I see the proof is made by Susannah *Ellis*. She swears that since she went into the service of the bankrupt, a variety of persons called upon him, whom she knew to be creditors. That she had instructions not to let in any one who rang at the door bell, till she had come in and enquired whether he would be at home. That *Taylor* enquired for the bankrupt; she told him she did not know whether he was at home, and that she went to the bankrupt, who told her to say he was not at home. She also remembers denying a blacksmith, and that about the same time the bankrupt frequently slept from home. His Lordship then read the Vice Chancellor's order,

1817.
Ex parte
Bogen.
 —In the
 Matter of
Bogen.

and proceeded to say: This is an order by which I think the Vice Chancellor meant to bring into question before the jury, the credit of Susannah *Ellis*. By this notice, the plaintiff proposes to establish other acts than that proved before the commissioners. I remember when it was doubted even at law, whether other acts than that upon which the commission was founded could be proved in an action, but it having become settled that you might give other acts in evidence to establish the bankruptcy, this court following the example of the courts of law, as I have heard Lord *Thurlow* say, very unwillingly granted issues and actions to try the validity of the commission upon other acts than those that appeared upon the proceeding. It then being a matter of indulgence to permit other acts to be proved, the court ought strictly to hold the party who seeks to support the commission by such other acts to state by his notice upon what he relies, and what evidence he intends to prove his case, so that the bankrupt may not be taken by surprise at the trial. I have seen so many miscarriages in the trials of these issues that I will myself settle the notice to be given in this case. With a view to avoid the inconveniences that arose in *Sherwood's* case, the act or acts proved ought to be endorsed on the postea.

The following is a copy of the notice as altered by his Lordship.—

In the Common Pleas, between William *Davidson* petitioner, and John Louis *Bogen*, defendant. The plaintiff means to insist on the trial of this issue, that the defendant did before the date and issuing forth of the commission of bankrupt against him, commit an act or acts of bankrupt, and with such intent as was necessary to constitute an act or acts of bankrupt, &c.

beginning to keep house and by absenting himself from his house as follows.

1817.

Ex parte
BOGEN.
—In the
Matter of
BOGEN.

That Susannah *Ellis* a witness to prove the same, being at the time a servant of the defendant did on some day between the 17th. and 23rd. days of *January*, 1816, but on which day in particular she is at present unable to specify, by the directions of the defendant, inform David *Taylor*, of *Woolwich*, in the county of *Kent*, bricklayer (to be proved to be then a creditor of the defendant, for a debt then due and demandable) and who had then come to the house to see the defendant, that the said defendant was not at home, although the said defendant was then in the house, in consequence of which denial, the said David *Taylor* left the house, without being at the time permitted to see him, although he did afterwards see him.

That the said Susannah *Ellis* also in pursuance of such instructions, and being at the time a servant of the defendant, did on some day between the 25th. of *February*, and 2nd. of *March*, 1816, but on which day in particular the witness cannot at present specify, at the house of the defendant inform the said David *Taylor* (to be proved to be then a creditor of the said defendant for a debt then due and demandable) who also had then come to the house to see the defendant, that the said defendant was not at home, although the said defendant was then in his house, in consequence of which, the said David *Taylor* left the house without being permitted at the time to see him, although he did afterwards see him.

That the said Susannah *Ellis* did also in pursuance of such instructions, being at the time a servant of the defendant, on some day between the 20th. and 27th. of

1817. *January, 1816, but on which day in particular the witness cannot at present set forth, inform Robert Whitby, of Woolwich, aforesaid, corn chandler, who had then come to the house of the said defendant (the said Robert Whitby to be proved to be then a creditor of the said defendant for a debt then due and demandable) that the said defendant was not at home, although the said defendant was then in his house, in consequence of which denial, the said Robert Whitby left the house without being permitted at the time to see him, although he did afterwards see him.*

Ex parte Bosen.
—In the Matter of Bosen.

That Susannah Ellis in pursuance of such instruction being at that time a servant of the defendant, did on some day between the 25th. day of *February*, and 2nd. of *March*, 1816, but on which day in particular she is unable at present to set forth, inform Lieutenant Colonel Jones, of *East Wickham*, in the county of *Kent* (to be proved to be then a creditor of the defendant, for a debt then due and demandable) and who had then come to the house to see the defendant, that the said defendant was not at home, although the said defendant was then in the house, in consequence of which denial the said Lieutenant Colonel Jones left the house without seeing him.

That George Willoughby a witness to prove the same, being at the time a servant of the defendant, did on some day between the 25th. of *February*, and 2nd. of *March*, 1816, but on which day he is at present unable to specify, by the direction of the defendant inform the said Lieutenant Colonel Jones, (to be proved to be then a creditor of the said defendant for a debt then due and demandable) and who had then come to the house to see the defendant, that the said defendant was not at home, although the said defen-

dant was then in the house, in consequence of which denial, the said Lieutenant Colonel Jones left the house without seeing him.

1817.

Ex parte
BOGREN.

—In the
Matter of
Bogren.

That the said George Willoughby being at the time a servant of the defendant, did on some day between the 23rd. of April, and 1st. of May, 1816, but on which day he, witness, is not at present able to specify, by the directions of the defendant, inform Henry Haslam, of Shooter's Hill, then calling on behalf of Thomas Sanders, of Bethnal Green, Esquire; the proprietor of the Shrewsbury estate (to be proved to be then a creditor of the said defendant, for a debt then due and demandable) and who had then come to the house to see the defendant, that the said defendant was not at home, although the said defendant was then in his house, in consequence of such denial, the said Henry Haslam left the house without at the time seeing him, although he did afterwards see him.

That the said defendant did absent himself from his house with intent to delay his creditors on some day between the 25th. of January, and 3rd. of February, 1816, by sleeping abroad, to be proved by William Andrews, of and by the said Samuel Ellis.

That the plaintiff means to avail himself of other testimony, to confirm the evidence that shall be given by the above witnesses.

If any acts of bankruptcy proved to be endorsed on the postea what acts are proved. Any special matter to be endorsed. Dated this 11th. day of December, 1817.

LINC. INN. *Ex parte* BRIGHTWEN.—In the Matter of
12. January. WELLS. (a)
1818.

Costs of the application given to a mortgagee by deposit upon a petition for the usual order, there being a written instrument specifying the agreement for the deposit.

BRIGHTWEN and *Wells* had been in partnership. By articles of the 19th August, 1816, it was agreed that the partnership should be dissolved from the 22nd June preceding, and that to secure balance of £500 due to the petitioner upon the partnership account a mortgage should be executed by *Wells*, and that the title deeds should be forthwith handed over by *Wells* to *Brightwen's* solicitor for the purpose, and that until the mortgage was executed the title deeds should be deposited and remain with the petitioner or his solicitor as a security, in the nature of an equitable mortgage for the said sum of £500.

The title deeds were deposited by *Wells* in the hands of the petitioner's solicitor, and remained in his custody. The mortgage was prepared. *Wells* refused to execute, and afterwards became bankrupt. There was a petition for an order to sell the premises as an equitable mortgage, and to prove for the residue. The only question was whether this did not form an exception to the general rule, that a mortgagee by deposit must pay the costs of the application.

Sir Samuel Romilly and Mr. Rose, for the petitioner.

Mr. Girdlestone contra.

(a) *Ex Relations.*

The LORD CHANCELLOR.

Looking to the mischievous effects of cases of mere deposit, and the difficulty the court has in dealing with them, the rule has been established that the party shall suffer for his negligence when he applies to make the security available, by paying the costs of the application. But the rule does not apply to a case where the parties have taken the trouble to get a written instrument, specifying the agreement upon which the claim arises. I therefore think the petitioner must have his costs,

1818.

Ex parte
BRIGHTWELL.
—In the
Matter of
WELLS.

Ex parte SMITH.—In the Matter of BAKEWELL. HILARY
TERM.
1818.

JAMES *Bakewell* the elder, and James *Bakewell* the younger, carried on the business of soap and glue manufacturers, in copartnership, the trade having been previously carried on by James *Bakewell* the elder on his separate account. By the partnership articles, it was agreed that the manufactory and premises, where the business was carried on, and the utensils of trade, which were of considerable value, should remain the separate property of James *Bakewell* the elder, and that James *Bakewell* the younger should pay £50 a year, by way of rent thereof, in proportion to his share of the business. The stock in trade was insured in their joint names. The manufactory and utensils were insured as the separate property of James *Bakewell* the elder. In December, 1814, the premises, stock in trade and utensils were consumed by fire. In April, 1815, a joint commission issued against the two *Bakewells*, under which they

Utensils of trade being the property of one partner, and insured in his name are left in the ordering and disposition of the partners. A fire happens by which they are consumed. After the fire a joint commission issues against the partners. The insurance money is paid to the joint assignees. Held that the insurance money does not pass by the assignment under the joint commission.

1817: were declared bankrupts, and their assignees received
Ex parte from the insurance office the whole amount of the pro-
 SMITH. perty insured. This petition was presented on behalf
 —In the of the separate creditors of James *Bakewell the elder*,
 Matter of amongst other things to have the money received by
 BAKEWELL. the assignees of the joint estate on account of the in-
 surance of the utensils of trade divided amongst the
 separate creditors of James *Bakewell the elder*.

It was admitted at the hearing that the utensils were
 at the time of the fire in the ordering and disposition
 of the partnership.

The point to be determined was, whether the insur-
 ance money passed to the assignees of the joint estate
 as being in the ordering and disposition of the partne-
 rship, or was it to be distributed amongst the separate
 creditors of the elder *Bakewell*.

His Honor the Vice-Chancellor, upon the peti-
 tion being opened, said,—Is there any case where it
 has been decided that the possession of utensils by a
 manufacturer is not within the statute? It is quite
 different from the case of ready furnished lodgings.
 There the common habits of society forbid the presump-
 tion that the furniture is the property of the lodger.
 The difficulty in this case is to see how the accident
 of the fire altered the possession. Can you say, sup-
 posing the utensils to be joint property, that the insur-
 ance money is not of the same quality?

Mr. Cooke for the petition.

It must be admitted when the fire happened that the
 utensils were in the ordering and disposition of the
 partners, but it does not therefore necessarily follow

CASES IN BANKRUPTCY.

169

that he insurance money due upon a policy that was effected in the name of that partner who was the sole owner of the property passed to the assignees under a joint commission. The moment before the bankruptcy took place, if the utensils had been removed, provided there had been no notice of insolvency, they would not have passed by the assignment. Suppose the utensils had been trust property vested in trustees upon certain trusts, the trustees, even with notice of the insolvency of the persons in whose possession they were, might have removed them. The case of *Darby v. Smith*, (a) has been overruled. But in this case notice is quite out of the question. The fire is accidental, and this accident put an end to the possession,

1817.
Ex parte
SMITH.
—In the
Matter of
BAKEWELL.

If it be said that the property was joint property, and therefore the insurance money must follow the nature of the property, I should submit to the court whether under that supposition the insurance office could have been called on to pay the money, as no one can insure property that is not his own.

Mr. Cullen for the assignees of the joint estate. The insurance office has paid the money, and the only question is how it is to be applied.

Darby v. Smith has not been overruled. The utensils at the time of the fire were in the possession, ordering and disposition of the partners. How then can a mere accident, unconnected with any intention on their part, alter the possession. Can it be said that the partner whose separate property these utensils were, did any act to change the nature of the property? If he did not the insurance money must follow the nature of the thing insured.

(a) 8 T. R. 82.

1817.

Ex parte

SMITH.

—In the
Matter of
BAKEWELL.

The VICE CHANCELLOR.

This is quite a new question. It is admitted that the utensils were in the possession of the partnership within the statute of James. A fire takes place not long before the bankruptcy, and the single question to be determined is whether the insurance money passes to the joint assignees. If I recollect rightly the case of *Darby v. Smith*, the property was withdrawn in contemplation of the bankruptcy. Such a removal being fraudulent could not alter the possession. But if the removal be not made in contemplation of bankruptcy, it may be done the moment before the bankruptcy takes place, and the property removed will not pass to the assignees. It has been justly observed, that the facts of this case preclude every supposition of a fraudulent removal. Speaking generally, the creditors can only stand in the place of the bankrupt. The statute of James makes an exception to the general rule, where property is left in the visible possession of a trader. In this case there was no visible possession at the time of the bankruptcy. The subject was gone, and the statute does not apply.

I think that part of the prayer correct which relates to the insurance of the utensils. (a).

(a) 21 Jac. 1. c. 19. sec. 10 & 11. "And for that it often falls out, that many persons before they become bankrupts, do convey their goods to other men upon good consideration, yet still do keep the same, and are reputed the owners thereof, and dispose the same as their own, Be it enacted, That if at any time hereafter any person or persons shall become bankrupt, and at such as they shall so become bankrupt shall by the consent and permission of the true owner and proprietary have in their possession

DE TASTET.—Against WALKER and others. HILARY

TERM.

1818.

THE bill stated, that in and prior to the year 1810 the plaintiff carried on the business of a commission If a plaintiff in equity might proceed at law for that which he demands by his bill, either by an action of assumpsit, or by an action for the tort, the bill may be demurred to, if it be in the nature of an action for the tort, but if it be in the nature of an action of assumpsit, the defendant may plead his bankruptcy and certificate.

“order and disposition, any
“goods or chattels, whereof
“they shall be reputed owners, and take upon them
“the sale, alteration or disposition as owners, that in
“every such case the said
“commissioners or the greater part of them shall have
“power to sell and dispose
“the same, to and for the
“benefit of the creditors
“which shall seek relief by
“the said commission, as
“fully as any other part of
“the estate of the bankrupts”

Many of the determinations upon this section are conflicting and not easy to be reconciled either with each other or with the language of the statute, which, as Lord Hardwicke has observed, 1 Atk. 159, is very darkly penned.

It was for some time doubted whether the preamble did not controul the enacting part, but it is now settled

that it does not. *Mace v. Cadell.* Cowper 232.

The cases upon this section of the statute fall under the one or other of the following heads, viz. First, as to the meaning of the term goods or chattels. Secondly, as to what is possession, order and disposition, or reputed ownership of goods or chattels. Thirdly, as to the title to which the possession, ordering and disposition, or reputed ownership is to be referred.

First, as to the meaning of the term goods or chattels. Chattel interests in lands and houses and things fixed to the freehold, are not within the act. *Ryall v. Rolle.* 1 Atk. 165. *Horn v. Baker,* 9 East. 215. except some utensils of trade, such as a dier's plant. *Bryson v. Wyllie.* 1 Bos. and Pull. 83. But all personal goods and chattels are within the statute; as furniture. *Ling-*

1818. merchant in the city of London, under the firm of *De Tastet* and Co. and in 1810 Messrs. *Livio*, of St. Petersburg, consigned to the plaintiff large quantities of *WALKER*, pearl ashes and other goods for sale on a *del credere* and others. commission. *George Sharp* the elder, and the defen-

ham v. Biggs. 1 Bos. and Pull. 82. Utensils of trade. *Horn v. Baker*. 9 East. 215. *Bryson v. Wylie*. 1 Bos. and Pull. 83. Choses in action, 7 T. R. 235. *Ryall v. Rolle*. 1 Atk. 165. Share in a newspaper. *Longman v. Tripp*. 2 New Rep. 67. Policies of Insurance, *Falkner v. Case*. 1 Brown C. C. 125; and the above case. Ex parte *Smith*.

Secondly, *As to what is possession, order and disposition or reputed ownership of goods or chattels*. The possession of a servant cannot be adverse to that of his master, although the servant act as a bailiff under a fi. fa. *Jackson v. Irvin*. 2 Camp. 48; and where execution is levied but is concealed for a length of time, the trader apparently remaining in possession, he is the reputed owner. *Toussaint v. Hartop*, 1 Holt, 335. The goods of a woman living with a man, and giving out that they are married, are in his ordering and disposition. *Mace v. Cadell*. 1 Cowp. 232. The possession must be continued till the time of the bankruptcy. *Jones v. Dwyer*, 15 East. 21.; and the above case, Ex parte *Smith*. But it continued till the eve of

the bankruptcy, and then given up in contemplation of it, the possession is within the statute. *Darby v. Smith*, 8 T. R. 82. To change the possession of a newspaper an affidavit must be made according to the statute 38 Geo 3rd. c. 78. s. 42. New Rep. 68. In order to assign a chose in action, so as to take the possession out of 11th section of the statute, notice must be given to the debtor. *Ryall v. Rolle*. 1 Atk. 165. 7 T. Rep. 237. *Gordon v. East India Comp.* 7 T. R. 228.; but in *Winch v. Keeley*, 1 T. R. 619. it did not appear that the debtor had notice of the assignment. The possession of book debts, and other debts, not in the nature of specialty debts, is transferred by giving notice to the debtor of the assignment. *Ryall v. Rolle*. 1 Atk. 177. 1 Ves. 367. *Row v. Dawson*. 1 Ves. 331; and as to the effect of a general notice in the gazette, Ex parte *Wheeler*, ante 25; but in the cases of bond debts notice alone is not sufficient, the bond must be also delivered to the assignee. *Ryall v. Rolle*, 1 Atk. 177. 1 Ves. 367; so also a debt due to a bankrupt upon a promissory note which he had delivered to a

George Sharp the younger, and William Sharp 1818.
 the business of sworn brokers in Thread-
 street, and the plaintiff employed them as his
 for the purpose of entering and landing the
 fashies and other goods in the port of London.

DeTASTET
 WALKER,
 and others.

before his bank-
 rupt of his ordering
 situation. Ex parte
 Atk. 124. Goods
 in the name of an
 an East India ship
 per of his privilege,
 possession as re-
 member. Gordon v.
 a Comp. 7 T. R.
 saw the property in
 is transferred by
 of the indorsed
 ing for a valuable
 ion. Lickbarrow v.
 T. R. 63. 1 H.
 7. 5 T. R. 683.
 note. (a) Haille
 1 Bos. and Pull.
 the ordering and
 may be transfer-
 delivery of unin-
 ills of lading and
 Brown v. Heath-
 Atk. 159. Lem-
 Pasley. 2 T. R.
 to the transfer of
 ion of ships at sea
 port since the late
 Abbott's Treatise,
 v. Glennie. 4 Maul
 240. Dixon v.
 ite 94.
 , as to the title to
 possession or order-
 disposition is to be
 A woman living
 er, and giving out
 are married, her

goods pass to his assignees.
Mace v. Cadell. 1 Cowp.
 232; but husband and wife
 possessing and using furni-
 ture which, previous to their
 marriage, was settled to her
 separate use, the furniture
 was held not to pass to his
 assignees. *Jarman v. Wool-*
lerton. 3 T. R. 618. Furni-
 ture given to trustees to per-
 mit a female trader, and her
 children to have the use of
 it, she and they are left in
 possession; the furniture
 does not pass to her assign-
 ees. Ex parte *Martin.* 2
 Rose B. C. 331. The pos-
 session must be with the con-
 sent and permission of the
 owner of the property, there-
 fore the property of infants
 incapable of consenting is not
 within the statute. *Viner v.*
Cadell. 3 Esp. 88. So also
 if the possession be obtained
 by a criminal fraud. *Glad-*
stone v. Hadwen. 1 Maul
 and Sel. 517. If shares in
 a trading concern are in the
 ordering and disposition of a
 trader as trustee to the owner,
 who before the bankruptcy
 of the trustee dies and makes
 him his executor and resid-
 ary legatee, his possession in
 his character of executor,
 prevents the shares from
 passing under his commis-

1818. *George Sharp* and Co. landed and entered the pearl ashes and goods in their own names at a wharf belonging to Messrs. W. H. Sharp and J. Cotchett, wharfingers. *George Sharp* and Co. paid the customs and other dues and charges, which were repaid to them by
- DE TASTET**
v.
WALKER
and others.

sion, *Jay v. Campbell*. 1 Sch. and Lef. 328. Property remaining in specie in the hands of an executor or administrator does not pass to the assignees. *Ex parte Marsh*. 1 Atk. 158. *Ex parte Llewellyn*. 1 Cooke B.L. 152. 1 Black. 401. 3 Burr. 1369. *Ludlow v. Browning*. 11 Mod. 138. *Viner v. Cadell*. 3 Esp. 88; or with a trustee for sale for the payment of debts. *Copeman v. Gallant*. 1 P. Wm. 314; or with a factor. *Godfrey v. Furzo*. 3 P. Wm. 185. *Ex parte Dumas*, 2 Ves. 582. *Paul v. Birch*. 2 Atk. 623. 5 T. R. 226. 1 Cowper, 232; and if the goods be sold, the proceeds, so long as they are ear marked or distinguishable, follow the nature of the goods. 2 Ves. 586. *Whitecombe v. Jacob*. 1 Salk. 160. *Taylor v. Plummer*. 3 Maul and Selw. 562. *Ex parte Sayers*. 5 Ves. 169. And if the assignees receive the monies arising from goods so sold by him and due before his bankruptcy, they will be liable to repay the same to the principal. *Scott v. Surman*. Willes 400. *Gurratt v. Cullum*. Willes 405. *Ex parte Murray*. 1 Cooke B. L. 392. Also if the factor sell on his own account, concealing that he is a factor (provided the principal give notice to the buyer). *Scrimshire v. Alderton*. 2 Strange 1182; but in that case a buyer may set off a debt due from the factor to himself. *George v. Claggett*. 7 T. R. 699. *Rabone v. Williams*. 7 T. R. 360. *Stracy v. Deasy*. 7 T. R. 361. If an agent in fraud of his trust apply the property in purchases, the things purchased do not pass to his assignees. *Taylor v. Plummer*. 3 Maul and Selw. 562; but not so if the factor with the consent of the true owner sell as being the principal. *Livesay v. Hood*. 3 Camp. 83. Furniture let on lease to a coffee house keeper becoming bankrupt passes under the statute. *Lingham v. Biggs*. 1 Bos. and Pull. 82; so also utensils of trade let to the trader at a rent as a dying plant. *Bryson v. Wylie*. 1 Bos. and Pull. 83. Even when fixed to the freehold. *Horn v. Baker*. 9 East, 215. Though it might be the contrary if it were the usage of the trade to let out utensils. 9 East, 239. But where a certificated bankrupt was in possession of household goods and plate as tenant at will to his

the plaintiff. The pearl ashes and other goods were warehoused at the wharf in the names of George Sharp and Co. George Sharp and Co. not being able to find purchasers for the pearl ashes and other goods, the plaintiff directed them to put the same up to sale

1818.

DE TASTET
v.

WALKER
and others.

assignees, the property was held not to pass under his second commission. *Walker v. Burnell*. Doug. 317. A bankrupt having sold a house and furniture kept possession of the furniture under the agreement, which was notorious in the neighbourhood, the furniture was held not to pass to his assignees. *Muller v. Moss*. 1 Maule & Selw. 335; so also where timber was left in the possession of the bankrupt for the purpose of being worked up, although left with a view to deceive His Majesty's government, it did not pass to his assignees. *Collins v. Forbes*. 3 T. R. 316. Neither will the goods pass if the custody by the bankrupt be merely temporary for a particular purpose, and the owner has not been guilty of laches. Ex parte *Flyn*. 1 Atk. 185; but where purchased hops were left in the seller's warehouse, undistinguished from his own goods, the statute was held to apply. *Thackwaite v. Cock*. 3 Taunt. 487. A dormant partner's share in a trade does not pass to the assignees under a commission against his partners. *Coldwell v. Gregory*. 1 Price 119; but this decision has been doubted. Ex parte

Dyster. 3 Rose B. C. 256. Ex parte *Barrow*. 2 Rose B. C. 252. Ex parte *Wilson*. ante 48. Where the possession is under a bare authority to sell, the statute does not apply. *L'Apostre v. Le Plaistrier*. 1 P. Wm. 318. A policy of insurance left in pawn by the insured with the insurer to secure the premiums, was held not to pass to the assignees of the insured against the insured's assignee of the equity of redemption. *Falkener v. Case*. 2 T. R. 491. 1 Br. C. C. 125. Bills of exchange and goods sent to a merchant to be specifically applied to a particular purpose, do not pass to his assignees. Ex parte *Dumas*. 2 Ves. 582. *Tooke v. Hollingsworth*. 5 T. R. 215. Ex parte *Oursell*. Ambler 297. *Parke v. Eliason*. 1 East 544. *Zinck v. Wulker* Black. 1154. Bills remitted to answer acceptances. *Hassall v. Smithers*. 12 Ves. 119, and short bills deposited with a banker do not pass to the assignees. Ex parte *Parr* infra; but whether bills are to be considered as short or not depends upon the mode of dealing between the parties. *Giles v. Perkins*. 9 East 12. Ex parte *Fauss*. 1 Rose B. C. 232. Ex parte

1812. by public auction, which they accordingly did on the 21st. of July, 1812. That at such sale only part of the said pearl ashes and other goods were sold. That **De TASTET** *v.* **WALKER and others.** W. H. *Sharp* and J. *Cotchett*, in pursuance of a written order from George *Sharp* and Co. dated the 21st of *September*, 1812, transferred in their books kept at the wharf, into the names of the defendants *Walker* and Co. the pearl ashes remaining unsold at the public auction. That George *Sharp* and Co. represented to the plaintiff that all the pearl ashes and other goods had been sold at the public auction, and in consequence of such representation the plaintiff advised Messrs. *Livio* to that effect. That in such statement made by George *Sharp* and Co. they gave the plaintiff credit for the net proceeds of the sale at the public auction mentioned therein; but in fact a large quantity of pearl ashes were bought in by or on the behalf of George *Sharp* and Co. which purchase the plaintiff insisted was fraudulent as against him for the reasons thereafter mentioned. That George *Sharp* and Co. pledged 434 casks of pearl ashes as a security for some balance or sum of money alledged to be due to *Walker* and Co.; and in order to make such pledge available, George *Sharp* and Co. sent the said order of the 21st of *September*, 1812, to W. H. *Sharp* and J. *Cotchett*, and that in point of fact the said 434 casks of pearl ashes were not sold to *Walker* and Co. That George *Sharp* and Co. stopped payment in the month of *September*, 1812, when the plaintiff first discovered

the *Wakefield Bank*. 1 Rose B. C. 243. Ex parte the *Leeds Bank*. 1 Rose B. C. 254. Ex parte *Buchanan*. 1 Rose B. C. 280. Ex parte *Rayton*. 1 Rose B. C. 14. But unless bills are deposited to answer a particular purpose, they pass to the assignees. *Bent v. Puller*. 3 T. R. 494.

that the 434 casks of pearl ashes had not been really sold, but that they had been deposited with *Walker and Co.* That upon this the plaintiff served *W. H. Sharp* and *J. Catchett* with a notice that the pearl ashes were his property, whereupon *W. H. Sharp* and *J. Catchett* put padlocks upon the warehouses wherein the pearl ashes were lying, and delivered the keys to the plaintiff. That soon after *Walker* and *Co.* also put padlocks upon the warehouses, and refused to allow the wharfingers to deliver the pearl ashes to the plaintiff, whereby he lost the opportunity of an advantageous sale. That on the 1st. of *October*, 1812, a commission of bankrupt issued against *George Sharp* and *Co.* under which they were duly found and declared bankrupts, and *Macdonald*, *Reikes* and *Mayer*, other three of the defendants, were chosen their assignees. That soon after the issuing of the commission *Walker* and *Co.* in collusion with the assignees and with the bankrupts, gained admittance into the warehouses, and took away the pearl ashes, which they sold, and applied the proceeds of the sale to their own use. And charging that it was not usual or customary for brokers in the city of *London* to buy or sell goods on their own account or on joint account with others for their own benefit and advantage, and that it was contrary to the oath of a broker as well as to the condition of his bond to buy or sell goods on his own account, or jointly with others to make any gain or profit. But if the fact was that *George Sharp* and *Co.* on a joint account of *Walker* and *Co.* had bought goods, the property of the plaintiff, put into the hands of *George Sharp* and *Co.* for sale for their own benefit, or if *George Sharp* and *Co.* made any gain or profit by buying or selling goods over and above the usual brokerage, such proceedings were a fraud upon the plaintiff, and that *Walker* and *Co.* having notice that *George Sharp* and *Co.* acted as

1812.
DE TASTET
v.
WALKER
and others.

1878.

DE TASTET
v.WALKER
and others.

brokers ought not in the taking of the accounts to be allowed to participate in the gains and profits so fraudulently obtained. The bill further charged that George *Sharp* and Co. were not exonerated by their certificate (if obtained) from their responsibility which the plaintiff had sustained by reason of George *Sharp* and Co. taking to their own account the said pearl ashes, and rendering the said false and fraudulent account of the sales thereof to the plaintiff, but that they were still liable to answer to the plaintiff for such matters, and that they had or claimed an interest in the matters in question in the cause. That *Walker* and Co. knew that the pearl ashes were entered, landed and warehoused for sale by and under the direction of *Sharp* and Co. as brokers; and the bill prayed that it might be declared that *Walker* and Co. had no lien upon or right to detain against the plaintiff the pearl ashes or the proceeds thereof, and that all necessary accounts might be taken to ascertain the amount of such proceeds, and the balance paid to the plaintiff, and in case the court should be of opinion that the plaintiff was not entitled to such proceeds as against *Walker* and Co. then that it might be declared that the plaintiff had a lien in respect thereof upon the balance due from *Walker* and Co. to the estate of the bankrupts, and that such balance might be applied accordingly, and that *Walker* and Co. and the bankrupts might make good to the plaintiff the loss and damage he had sustained by the detention of the said pearl ashes, and that all necessary directions might be given to ascertain the amount thereof.

To this bill George *Sharp* the younger and William *Sharp*. put in the following plea answer and disclaimer, that is to say. They the defendants, &c. do plead respectively to so much of the said bill as seeks that the defen-

defendants may make good to the plaintiff the loss and **damage**, alledged to have been sustained by him, by **the** detention of the 434 casks of pearl ashes in the **said** bill of complaint in that behalf mentioned, and **that** all necessary directions may be given to ascertain **the** amount of such loss, and for plea thereto, and to **all** the discovery sought from these defendants with **re-**
lation thereto, or to any other matter in the said bill **contained**, except as to the question whereby these de-
fendants or one and which of them have not or hath **not** or do not or doth not claim some and what interest **in** the matters in question, in this cause these defen-
dants say, that by a statute or act of parliament made **and** passed in the 5th. year of his late Majesty King **George** the 2nd. and afterwards made perpetual, in-
titled an act to prevent the committing of frauds by **bankrupts**, "It is amongst other things enacted, that
 "all and every person and persons so become or to
 "become bankrupts, as in such act aforesaid who
 "should within the time thereby limited, surrender
 "him, her, or themselves, to the acting commissioners
 "named and authorized in or by any commission of
 "bankrupt. awarded or to be awarded against him, her
 "or them, as in and by the said act directed should have
 "certain allowances in the said act in that behalf, par-
 "ticularly mentioned out of the net produce of their
 "estate, and every such bankrupt should be discharged
 "from all debts by him or them due and owing at the
 "time that he, she or they, did become bankrupt, and
 "that in case any such bankrupt should be afterwards
 "arrested, prosecuted or impleaded, such bankrupt
 "should and might plead in general, that the cause of
 "such action or suit, did not accrue before such time as
 "he, she or they became bankrupts, and might give the
 "said act and special matter in evidence." Aver that
 they did respectively become bankrupt since the period

1818.

DE TASTET
 v.
 WALKER
 and others.

1818.
 DE TASTET
 v.
 WALKER
 and others.

in the said act referred to for the commencement of the operation and effect thereof. And that a commission of bankrupt under the great seal of Great Britain, bearing date at Westminster, the 1st. day of *October*, 1812, was awarded and issued against them, together with *George Sharp* the elder, deceased, their late father and copartner in trade, under which commission they these defendants and the said late *George Sharp* the elder, respectively were duly found and adjudged bankrupt, and that these defendants and each of them did within the time limited for that purpose, by the said act surrender themselves to the acting commissioners named and authorized in or by the said commission of bankrupt so awarded against them, and the said *George Sharp* the elder, and that these defendants and each of them did in all things conform as in and by the said act is directed. Aver that the said cause of action or suit in the said plaintiffs bill set up against these defendants, and each of them did accrue before such time as these defendants respectively became bankrupt, and therefore these defendants severally crave the benefit of the said act, and plead the same in bar to the relief and discovery, (except as before excepted) so sought against them respectively by the said bill of complaint, and pray the judgment of this Honorable Court, whether they or either of them, shall be compelled to make any other or further answer to the said plaintiffs said bill of complaint, save only as to the part thereof above excepted, out of this their plea. And these defendants not in any sort waiving their said plea do for answer to such said excepted part or question put to them in the said bill of complaint, and not covered by their said plea or to so much of such question as they are advised is material or necessary for them to make answer unto. Say that by a certain deed poll under the hands and seals of

these defendants, and the said George *Sharp* the elder deceased, dated the 26th. of *July*, 1813, these defendants and the said late George *Sharp* the elder, in consideration of 5s. paid them respectively by the assignees of their estate, released to the said assignees all surplus allowance, right, title, interest, benefit, claim and demand, which these defendants and the said George *Sharp* the elder deceased, or any or either of them could or might have claim, challenge or demand into or out of their estate, or against the said assignees personally in respect thereof both at law and in equity, and therefore in case these defendants ever had claimed or pretended to have or claim an interest in the matters in question, in this suit, such claim and interest would as they are advised, be now extinguished or transferred wholly to their said assignees. Say they do not know or believe that since their said bankruptcy, they or either of them have had claimed or pretended to have or claim any interest in the matters in question in this cause, and they do respectively disclaim all right, title and interest therein, and in every part thereof deny combination, &c.

1813.
De TASTET
v.
WALKER
and others

The VICE CHANCELLOR. (a)

(After stating the case made by the bill and the plea and answer) proceeded to say, this bill contains an allegation that there was a fraudulent conspiracy of the *Sharps*, and of the *Walkers*, to deprive the plaintiff of his property. An action for the tort would lie at law to which the bankruptcy could not be pleaded. The certificate would not be a bar to such an action. (b) But the plaintiff might, if he thought

(a) The reporter was not present at the argument. (b) As in an action of trespass for mesne profits *Good-*

1818. proper, waive the tort and proceed by an action of assumpsit, to which the certificate would be a bar. The case of *Johnson v. Spiller*, (a) is not law to the extent of establishing, that the party is bound to proceed in an action for the money, and not for the tort. (b) The question then is, whether this bill is analogous to an action of assumpsit, or to one founded on the tort. In truth the plaintiff could not substitute a bill in equity in the place of an action for the tort, as a bill of that nature would be demurrable to; for though a court of equity will sometimes direct an issue, to ascertain the extent of damage, yet that is only in cases where the damages to be ascertained are inci-

tute v. North. Douglas 583. Assault and battery, *Walter v. Sherlock*, 3 Wilson, 272. Trover where the conversion happened before the bankruptcy. *Parker v. Norton* 6 T. R. 695. Breach of promise of marriage. *Buss v. Gilbert*, 2 Maul. and Selw. 70.

(a) Douglas, 167.

(b) Lord Kenyon, C. J. in answer to an argument put at the bar, that a plaintiff having two remedies, the one arising out of contract and the other in tort, ought not to be permitted to do that in one form of action which he could not do in the other, says, "The defendants case is rested on the dictum of a very respectable Judge in the case of *Johnson v. Spiller*. But I understand Mr. J. Buller in using the words attributed to him, to have meant only this, that

"if a person has his election of two remedies, and may either bring trover or any other action, the possibility of his electing to bring trover shall not prevent his proving his debt under the commission of bankruptcy if he will waive the tort; and I assent to the proposition so qualified. In the present case, the defendant did not receive all the money which was due on the note, the discount was deducted. If the plaintiff after considering what remedy he should take, had brought an action for money had and received, he would have affirmed the act of the defendant, and the bankruptcy and certificate would have been an answer to that action. But can it be said that the plaintiff was bound to resort to such an action, and to

debtal to equitable relief. Here both the demands made 1818.
by the bill go to affirm the sale. The prayer is as against **DE TASTET**
Walker and Co. to have an account of the proceeds of **v.**
the sale, or if the opinion of the court should be against **WALKER**
the plaintiff on that point, then to have the balance and others,
due from *Walker* and Co. to the estate of the bank-
rupts, applied in satisfaction of the plaintiffs demand.
The bill must therefore be treated as if the plaintiff
had elected to proceed for money had and received to
his use, and the certificate consequently will be a bar.

The plea must be allowed.



Ex parte HEARN.—In the Matter of **HAMLIN.** HILARY
TERM.
1818.

ROBERT HAMLIN the elder, in the year 1801 A mortgagee
borrowed of Henry *Hearn* the sum of £900 upon having ad-
the mortgage security of certain estates in the county vanced to the
of Devon. In 1810 Henry *Hearn* advanced to mortgagor a
Robert *Hamlyn* the elder the further sum of £500, for further sum
which it was alledged the said Robert *Hamlyn* the upon his bond
Held that the
bond though
obscurely
worded, was
evidence of

an agreement for a further charge upon the mortgaged premises.

A father at the request of his son, executes a mortgage to secure a debt due from the son to the mortgagee. Held that the mortgage is not a voluntary conveyance, without consideration, within 1 Jac. 1. c. 15. s. 5.

"abandon the rest of his de- " same rule must prevail in
"mand? If he were, the " other cases. 6 T. R. 699."

CASES IN BANKRUPTCY.

1818.
Ex parte
HEARN
 —In the
 Matter of
HAMLIN.

elder agreed to charge the said mortgaged premises with the payment. As evidence of such agreement the following bond executed at the time when the further sum of £500 was advanced, was relied upon.

“ Know all men by these presents that I, Robert *Hamlyn* of Bideford, in the county of Devon, Mercer, am held and firmly bound to Henry *Hearn*, of Buckland Filleigh, in the county of Devon, Gent. in the penal sum of £1,000, in addition to a former bond of mortgage for the penal sum of £1000, held together with this as a collateral security for certain lands in Parkham, of good and lawful money of Great Britain, to be paid to the said Henry *Hearn*, or his certain attorney, executors, administrators and assigns, for the true payment whereof I bind myself, my heirs, executors and administrators firmly by these presents sealed with my seal, dated this 24th day of September, in the 50th year of the reign of our Sovereign Lord George the Third by the grace of God, of the United Kingdom of Great Britain and Ireland, King Defender of the Faith, and in the year of our Lord 1810. The condition of this obligation is such that if the above bounden Robert *Hamlyn*, his heirs, executors or administrators, or either of them, shall and do well and truly pay or cause to be paid unto the above named Henry *Hearn*, his executors, administrators or assigns, the full sum of £500, with lawful interest for the same of good and lawful money of Great Britain, on the 24th day of *March* next ensuing the date hereof, without fraud or further delay, then this obligation to be void and of no effect, or else to remain in full force and virtue.”

In the year 1812 John *Chanter*, the partner of Robert *Hamlyn* the elder, as his agent as was alledged,

proposed to Thomas *Smith*, one of the petitioners, to admit Robert *Hamlyn* the younger as a partner with the petitioner Thomas *Smith* in his practice and profession of an attorney, and upon that treaty the terms of an agreement were settled and were reduced into writing, and were signed by Robert *Hamlyn* the younger and Thomas *Smith*, in the presence of John *Chanter*, who witnessed the execution of the agreement, which purported to be conditions of partnership between Thomas *Smith* and Robert *Hamlyn* the younger; and the first condition was as follows.—Consideration to be paid to Mr. *Smith* £1700, this sum to be secured by mortgage of freehold estates of the said Robert *Hamlyn* or his father to the approbation of Mr. *Smith* with interest for the same at £5 per cent. per annum, to be paid regularly half yearly at Michaelmas and Lady-day, without any deduction, or if any deduction is made Mr. *Smith* to receive out of the business annually a sum equal to such deduction.

1818.

Ex parte
HEARN.

—In the
Matter of
HAMLYN.

By indentures of lease and release made between *Hamlyn* the father and *Hamlyn* the son of the one part, and Thomas *Smith* of the other part, reciting that *Hamlyn* the father and *Hamlyn* the son were justly and truly indebted to Thomas *Smith* in the sum of £1700, and that for securing the repayment thereof, *Hamlyn* the father had agreed to convey and assure to the said Thomas *Smith* the premises therein mentioned, it was witnessed that in consideration of the sum of £1700 to the said *Hamlyn* the father and *Hamlyn* the son, paid by the said Thomas *Smith*, *Hamlyn* the father at the request of *Hamlyn* the son conveyed to Thomas *Smith* by way of mortgage the premises comprised in the mortgage to Henry *Hearn*.

The sum of £1700, mentioned in the mortgage

1818.
Ex parte
HEARN
 —In the
 Matter of
HAMLIN.

deed, was the sum mentioned in the partnership agreement between *Hamlyn* the son and Thomas *Smith*. A commission of bankrupt issued against Robert *Hamlyn* the elder and John *Chanter*, under which they were duly found and declared bankrupt.

The present petition was presented by the personal representatives of Henry *Hearn* the first mortgagee, and by Thomas *Smith*, praying the sale of the estates, and that out of the monies to arise by the same the petitioners the representatives of Henry *Hearn* might be paid the principal sums of £999 and £500 and interest, and in case the money to arise by such sale should not be sufficient to pay the two principal sums and interest, then that they might be at liberty to prove the difference against the separate estate of Robert *Hamlyn* the elder. And that in case there should be any surplus arising from the sale of the said premises after such payments made to the estate of the said Henry *Hearn*, that the petitioner Thomas *Smith* might be paid out of such surplus the principal and interest due to him on his said security, and in case the money to arise from such sale should not be sufficient to satisfy his mortgage debt of £1700 and interest, then that he might be at liberty to prove the deficiency under the commission against the separate estate of Robert *Hamlyn* the elder, and might be admitted a creditor for the same against such separate estate.

Mr. Bell and *Mr. Parker* for the petition.

The Solicitor General and *Mr. Roupell* on behalf of the assignees. If the bond of 1810 be a mere money bond it cannot be tacked to the mortgage. If it be contended that it is to operate as a further charge upon the lands it ought to be stamped as a deed. It

is therefore material with that view that it should be produced. As to the construction of the bond no sense can be made of it, and if the parties did intend to make the £500 a further charge upon the estate they certainly have failed in expressing any such intention upon the face of the bond.

1812.
Ex parte
HEARN.
—In the
Matter of
HAMLYN.

The mortgage to *Smith* is bad for want of consideration. The father was not a party to the agreement which was made between the son and *Smith*, and though it be alledged that *Chanter* acted as an agent for the father no proof has been adduced in support of that allegation, and *Chanter* has not made any affidavit. The exception in the stat. 1. Jac. 1. c. 15. s. 5, only extends to conveyances made upon the marriage of any of the bankrupt's children, which is not the case here. Here no consideration moves from the mortgagee to the bankrupt. The conveyance is then a mere voluntary conveyance to secure a sum for which the son only was liable.

THE VICE CHANCELLOR.

There are two questions in this petition. First, whether the bond is operative as an agreement for a further mortgage of the lands already mortgaged to the obligee, not whether it is an actual mortgage as stated by the counsel for the assignees. The second question is whether the lands are well mortgaged to *Smith* by the deed of 1812.

As to the first point the bond must be construed by its own terms. No evidence can be admitted to explain its import. It might be reasonably expected that the parties who had required a mortgage for the first sum advanced would also require a further security than the bond for the second advance. In my opinion the bond

1818.
Ex parte
HEARN
 —In the
 Matter of
HAMLIN.

must receive the construction that it was the intention of the parties that there should be a further security. It recites "that the bankrupt was bound in the penal sum of £1000, in addition to a former bond of mortgage for the penal sum of £1000, held together with this as a collateral security for certain lands in Parkham, of good and lawful money of Great Britain, to be paid to the said Henry *Hearn*, or his certain attorney, executors, administrators and assigns." Now in a sense the first bond may be called a collateral security for the lands to the amount of £1000, but the second bond was to be a collateral security for the same lands to the amount of £1000. I am therefore of opinion, though the language of the instrument is not clear, yet that it is sufficient to shew the intention of the parties that the lands should be a security for the £500. The second point that has been made in the argument is I think quite clear. The son by his partnership articles with the petitioner *Smith*, engages to pay him a consideration of £1700, and that until paid, it shall be secured by a mortgage of his father's freehold estate. Then the father, by a deed which recites that the conveyance was at the son's request, mortgages the premises accordingly to *Smith* for the £1700. How then can it be stated that the deed was without consideration? The consideration in law is equal, whether a man pledge his estate for his own debt, or the debt of another.

The order must be according to the prayer of the petition.

the **HUSTLER**.—In the Matter of **GOOD- LINC. INN.**
CHILD and Others. **10th March**
1818.

N and **WILLIAM JACKSON** carried on Six persons
in *London* as Ironmongers, under the firm of are in partner-
and *William Jackson*. They also carried on the ship as bank-
ers. Two of
them carry on
of bankers, in partnership with *John Good-* a distinct
the elder and *John Goodchild* the younger, trade in part-
nership. The
Jackson and *Thomas Jones*, at *Bishopwear-* two have bill
transactions
in the county of *Durham*, under the firm of with G, in the
course of
Childs, Jacksons and Co. and also in *London*, which in ex-
change for a
the firm of *Jacksons, Goodchilds* and Co. On bill drawn by
them upon
in *November*, 1815, a commission of bankrupt and accepted
by him, they
against the six partners, under which they were deliver to him
a bill drawn
and accepted
ed bankrupts. by the six

A petition was to expunge the proof of a debt partners, but
not indorsed
ing to £835 : 7 : 1, which the commissioners by the two in
their separate
character.
llowed to be proved against the estate of *John* G also pro-
cures a bill of
exchange de-
livered to him
by the two
partners with-
out their in-
dorsement to
be discounted
at the Bank of
England, and
pays over the
proceeds to
them. G pays
his acceptance
but both the
other bills are
dishonoured.
Held that G
William *Jackson*. It appeared that *Thomas* G also pro-
cures a bill of
exchange de-
livered to him
by the two
partners with-
out their in-
dorsement to
be discounted
at the Bank of
England, and
pays over the
proceeds to
them. G pays
his acceptance
but both the
other bills are
dishonoured.
Held that G
nd purchased of *John* and *William Jackson*, exchange de-
livered to him
by the two
partners with-
out their in-
dorsement to
be discounted
at the Bank of
England, and
pays over the
proceeds to
them. G pays
his acceptance
but both the
other bills are
dishonoured.
Held that G
to the amount of £191 : 1 : 1 which became due by the two
partners with-
out their in-
dorsement to
be discounted
at the Bank of
England, and
pays over the
proceeds to
them. G pays
his acceptance
but both the
other bills are
dishonoured.
Held that G
ayable in *October*, 1815, and that *John* and
partners with-
out their in-
dorsement to
be discounted
at the Bank of
England, and
pays over the
proceeds to
them. G pays
his acceptance
but both the
other bills are
dishonoured.
Held that G
in *Jackson*, and *Thomas Gowland* were in the
of mutually accommodating each other by the
nge (under discount) of bills of exchange, and
ing the account of each of such last mentioned
ctions by the payment of the difference of interest
ng thereon.

credit to raise the money wanted by the two partners, and therefore he
titled to prove against their estate for the amount of both the bills, deducting
pends received under the commission of one of the acceptors.

1818. In the month of *May*, 1815, upon the application of *Thomas Gowland* it was agreed between him and John and William *Jackson* that he should accept a bill of exchange to be dated the 25th. day of *May*, 1815, and to be drawn by John and William *Jackson* upon him for £493 payable two months after the date thereof, against and in exchange for a bill of exchange for the like amount, dated the 11th. of the same month, and drawn by the firm of *Goodchilds, Jacksons and Co.* upon and accepted by the firm of *Jacksons, Goodchilds and Co.* payable at 60 days after date, and indorsed by one *Matthew Shout*, and two other persons. In consequence of this agreement, the said bill of exchange for £493, drawn by *Goodchilds, Jackson and Co.* upon *Jacksons, Goodchilds and Co.* was delivered to *Thomas Gowland* by John and William *Jackson* without their indorsement thereon, and the said *Thomas Gowland* accepted a bill of exchange drawn upon him by John and William *Jackson* for the like amount, and paid them the difference of interest arising from his acceptance becoming due at a latter period than the bill of exchange so delivered to him.

Thomas Gowland duly paid the bills of exchange accepted by him, but Messrs. *Jacksons, Goodchilds and Co.* having stopped payment before the bill accepted by them became due, it was dishonored, and *Thomas Gowland* proved against the joint estate of the said firm of *Jacksons, Goodchilds and Co.* the amount of the bill of exchange accepted by them. In his affidavit of the debt he stated "that the said bill of exchange was delivered to him in consideration of money to the full amount thereof advanced and paid by him upon the credit and security of the same, and for which sum of £493, or any part thereof, he had not nor had any person by his order or to his use received any security or satisfaction whatsoever." The affi-

CASES IN BANKRUPTCY.

173

debit referred to an account current annexed for the particulars (a). 1818.

Ex parte
HUSTLER
—In the
Matter of
GOODCHILD
and others.

(a) Messrs John and William Jackson in account current with Thomas Gowland.

Dr.			Cr.
1815.			1815.
July 18. To Goodchild and Co, on Jackson & Co. due 14th inst. £493 returned unpaid, noting 1s. 6d.	493 1 6		Oct. By amount of goods shipped Oct. 1814, now due. } 191 1 1
			Balance carried down 1155 6 1
Aug. 10. To Alexander Mackay, on Clementson and Co. due 9th inst. £853 : 4 : 2, returned unpaid, noting 1s. 6d.	853 5 8		
	<u>£ 1346 7 2</u>		<u>£ 1346 7 2</u>

	1816.	
Balance brought down £1155 6 1	Feb. 17. By received 4s. in pound on £853 : 4 : 2 of C. and Co.	170 12 10
	June 6 do. 2s. do.	85 6 5
	Sep. 19 do. 1s. 6d. do.	63 19 9
		<u>£ 319 19 0</u>
	Balance	835 7 1
		<u>£ 1155 6 1</u>

(Signed) T. Gowland.

1818. *Thomas Gowland* and *John and William Jackson* were also in the habit of sending bills of exchange into the bank of England to be discounted for their mutual convenience and accommodation. *William Jackson* on behalf of himself and *John Jackson*, on the 9th of *June*, 1815, sent to *Thomas Gowland* several bills of exchange amounting to upwards of £2000, including a bill of exchange for £853 : 4 : 2, drawn by *Alexander Mackay* upon *Clementson, Borrodale* and Co. and indorsed by the said *Alexander Mackay*, but not indorsed by *John and William Jackson*, and requested *Thomas Gowland* to send them into the bank to be discounted. *Thomas Gowland* accordingly indorsed the said bills of exchange and procured them to be discounted by the bank of England, and paid the proceeds thereof to *John and William Jackson*.

The said bill of exchange for £853 : 4 : 2 having been dishonored by Messrs. *Clementson, Borrodale* and Co. the acceptors, in consequence of their insolvency, *Thomas Gowland* as the indorser paid its amount to the bank of England.

The bill of exchange for £853 : 4 : 2 was regularly entered in the bill book of the firm of *Jacksons, Goodchilds* and Co. with the initials and words "T. G. 9th *June*" written against it, and the proceeds of the said bill with others were also entered in the cash book of the said firm of *Jacksons, Goodchilds* and Co. with the name "T. Gowland" written against them, and were posted in the ledger of the said firm to the credit of the firm of *Goodchilds, Jacksons* and Co. which entries as it was sworn by an accountant denoted that the said bill of exchange was the property of the said firm of *Jacksons, Goodchilds* and Co. and the proceeds thereof were received by and applied for the use of that firm.

In the ledger of John and William *Jackson* there were two accounts opened in the name of Thomas *Gowland*, in one of which he was charged with goods sold and delivered, and in the other with the exchange of bills which took place between him and the said firm of John and William *Jackson*, but neither the said accounts or any of the books of the said firm of John and William *Jackson* contained any entry whatever of the said bill of exchange, except a memorandum in the hand writing of the said William *Jackson* (made after the commission of bankrupt had been issued against him) at the foot of the account opened with the said Thomas *Gowland* for goods, for the purpose as it appeared of ascertaining how the balance proved by Thomas *Gowland* was deduced.

1818.
Ex parte
HUSTLER
—In the
Matter of
GOODCHILD
and others.

An accountant deposed that the said bill of exchange for £853 : 4 : 2 would have been regularly entered in the said bill book and ledger as deponent believed, from the correct manner in which the said books had been kept, if the said bill of exchange had belonged to the said firm of John and William *Jackson*, or the transactions with the said Thomas *Gowland* had been for the account of that firm.

The commissioners permitted Thomas *Gowland* to prove against the estate of John and William *Jackson* for £835 : 7 : 1 being the amount of both the bills of exchange for £493 : 1 : 6 and £853 : 5 : 8. after deducting therefrom the said sum of £191 : 1 : 1 due for goods sold and delivered to him, and also deducting £319 . 19, received by him under *Clementson, Borrodailes and Co's.* commission.

The petition was to expunge the proof for £835 : 7 : 1 against the estate of John and William *Jackson*.

1818. Sir Samuel Romilly and Mr. Cooke for the petition
Ex parte contended, that *Gowland's* proof upon both the bills
HUTLER ought to be expunged. As to the bill for £493 they
 —In the said that the transaction was a purchase. That he had
 Matter of bought it by giving a bill of his own in exchange.
Goodchild That he himself treated it as a purchase, and not as a
 and others. security, was evident from the manner in which he
 proved the bill against the estate of *Jacksons, Good-*
childs and *Co.* for in his affidavit he stated that the bill
 was delivered to him, in consideration of money to the
 full amount thereof advanced by him. As John and
 William Jackson carried on a separate trade in part-
 nership quite distinct from the banking concern, the
 same rule must apply as if the bill had been drawn
 and accepted by strangers. As to the bill for
 £853 : 4 : 2. they argued that although *Gowland*
 having put his name to this bill in order to effect
 the discount thereof at the bank of England paid
 the money to John and William Jackson, yet the money
 was in fact paid to them to the use of *Jacksons, Good-*
childs and *Co.* That there was a case lately before
 the Lord Chancellor where it did not appear for whose
 use the discount was effected, the way adopted in that
 case was by directing an enquiry, and an examination
 of the books of the parties.

That *Gowland* had not made any affidavit as to the
 manner in which he treated the transaction in his books.
 That he had been careful not to swear that he effected
 the discount for John and William Jackson, and there-
 not being any evidence in opposition, the affidavit
 made must be considered as giving a true account
 of the transaction.

Mr. Wetherell for the respondent insisted,

That as the *Jacksons* were partners in the bank

their names appeared upon the bill for £498, and therefore the case was not the common one of a person passing away without endorsement a bill drawn by a stranger to the transaction. As to the bill discounted at the bank of England he argued that *Gowland* having paid the proceeds to the *Jacksons* they became his debtors to that amount, and that he had nothing to do with any arrangement between the two partnerships, or with the further application of the money.

1818.

Ex parte
HUSTLER.

—In the
Matter of
GOODCHILD
and others.

The VICE CHANCELLOR.

I think the correct statement of this case is, that *Gowland* lent the *Jacksons* his credit to raise the money they wanted, and that in the one case he held the bill as a security for his acceptance, and in the other as a security for his endorsement. It certainly was the intention of the parties that *Gowland* should pay his acceptance, and it was also the intention that money should be raised at the bank of England on the second bill, by means of *Gowland's* credit there. He is therefore a creditor of the *Jacksons* for his acceptance paid for their use before the bankruptcy, and for the money raised upon his credit at the bank of England for their use.

The petition must be dismissed.

Upon the question of costs his Honor said.—If a creditor be brought before the court to have his debt expunged, and no good grounds are shewn why that should be done, as a general rule he is entitled to have his costs, but here I think the assignees had a fair cause for bringing the creditor before the court, for the affidavit he made upon his proof was calculated to mislead, I therefore shall not give him his costs (*a*)

(*a*) As to whether the transfer of a bill be a sale or discount, see the cases collected in *Ex parte Robinson*, note (*a*). Anté 114.

March 10th *Ex parte* DODSON.—In the Matter of GREEN-
1818. WOOD.

An affidavit
in support of
a petition to
stay a certi-
ficate filed
after the peti-
tion is pre-
sented cannot
be read.

MR. ROUPELL in support of this petition to stay the certificate proposed to read an affidavit filed after the petition was presented.

The VICE CHANCELLOR.

You cannot read that affidavit. The rule is that the petitioner cannot read an affidavit in support of a petition to stay the certificate, unless it were filed when the petition was presented (a) Sometimes indeed (b) the court will permit the petitioner to read an affidavit explanatory (c) of some matter introduced by the bankrupt in answer to the petition, but this affidavit is not of that nature.

(a) General order, 12 April, 1796.

(b) General order, 16 November, 1805. 11 Ves. 642. *Ex parte Bank of Scotland* 1 Ves. and Beam. 5 Affidavits in support of petitions to stay certificates, are from necessity an exception to the rule, that affidavits

sworn previously to the answering of the petition are inadmissible in evidence. *Ex parte Overton*, 2 Ross, B. C. 257.

(c) The practice is to hear the petition, and then for the court to say whether further affidavits are necessary. 1 Ross, B. C. 378. note (a)

Ex parte YOUNG.—In the Matter of LARK.

LINC. INN.

March 10,

1818.

BY an indenture dated 25th Nov. 1812 (being a settlement made previously to the marriage of Henry ~~Lark~~ with Mary Greenar) and made between him of the first part, his intended wife of the second part, and the petitioners of the third part, after reciting that upon the treaty for the marriage, and in consideration thereof, and of the settlement to be thereupon made of the property of the wife, and with a view to secure some provision as well for her in case the marriage should take effect, and she should happen to survive her husband, as for the issue of the marriage Henry Lark had agreed to settle and assure the mesuage and premises therein described, in manner thereinafter mentioned, and that it was also further agreed by Henry Lark that his wife should from and after his decease have the use and enjoyment of all such household goods, furniture, &c. as he should or might be possessed of at his decease, and which should be in his then or last place of residence, for the term of her natural life. And that Henry Lark further proposed and agreed that he would covenant for the payment to the trustees of his settlement for the time being the sum of £3000, within six months after his decease with interest for the same from the day of his death, upon the trusts thereinafter declared of and concerning the same. It was witnessed that in pursuance and part performance of the said agreement, and in consideration of the marriage and of the settlement made

If in a marriage settlement the bankruptcy of the husband be made the event upon which the sum agreed to be settled by him shall become payable to the trustees, the proof of the trustees under his commission will be limited to the amount of the wife's fortune which he has received

1818.

Ex parte
YOUNG.—In the
Matter of
LARK.

or intended to be made of the property of the said Mary *Gravenor Henry Lark* did bargain, sell, assign and set over unto the petitioners, their executors, administrators and assigns, all that messuage or tenement and premises situate in Upper Bedford Place, therein particularly described, to hold unto the petitioners, their executors, administrators and assigns from thenceforth for the residue of a term of 98 years thereof granted in and by an indenture of lease therein recited, dated 3rd. *February* then last past, then to come and unexpired, upon the trusts therein mentioned (that is to say) Upon trust to permit *Henry Lark* and his assigns to receive and take to his own use the rents, issues and profits thereof, for and during the term of his natural life, and after his decease upon trust, in case his wife should happen to survive him, to permit and suffer her and her assigns to hold, use, occupy, possess and enjoy the said premises, and receive and take the rents and profits thereof during the term of her natural life, and after the decease of the survivor of them upon trust to assign and make over the premises and the rents thereof, or such part thereof as should not have been applied under the powers thereafter contained, unto and amongst all and every or any one or more of the children of the said marriage, as *Henry Lark* should by deed or will direct, and in default of such directions then as his wife in case she should survive him, by deed or will direct, and in default of such direction equally amongst such children, and in case there should be no such children, or who should not live to take a vested interest in the said premises under the trusts therein declared, in trust to transfer the said premises, unto the executors or administrators of *Henry Lark*, as part of his personal estate; and it was by the said indenture further witnessed that in further pursuance and performance of the said agree-

ment, and for the considerations and purposes afore-
 said, Henry *Lark* for himself, his heirs, executors
 and administrators, did covenant promise and agree,
 to and with the petitioners, their executors, adminis-
 trators and assigns, that in case the said intended
 marriage should take effect, and the said *Mary*
Gravenor, or any issue of the said intended marriage
 should happen to survive him, his heirs, executors, or
 administrators, should within six calendar months next
 after his decease, pay unto the petitioners or to the sur-
 vivors or survivor of them his executors, administrators
 or assigns, the full sum of £3000 with interest for the
 same, from the day of his decease; and it was thereby
 agreed, and declared that the petitioners and the survi-
 vors and survivor of them, should and would from and
 immediately after the payment of the said £3000 and the
 interest thereof, stand and be possessed thereof, upon the
 same trusts as therein declared, of and concerning the
 said leasehold premises therein before assigned, provided
 always, and it was thereby further agreed and declared,
 that it should and might be lawful to and for the said
 Henry *Lark*, at any time during his life to discharge his
 said covenant lastly therein before contained, for pay-
 ment of said £3000, and interest, and to exonerate
 his heirs, executors and administrators from all future
 liability to the performance thereof, by investing or
 laying out £3000 in the public stocks or funds, or upon
 government or other good and sufficient real securities
 at interest, in the names or name of the trustees or
 trustee of the said settlement for the time being.
 Provided always and it was thereby further agreed and
 declared, between and by the said parties, that in case
 said intended marriage should take effect, and Henry
Lark should happen at any time afterwards during his
 life fail in trade and become bankrupt, or otherwise
 insolvent, and compromise or compound with his cre-

1318
 Ex parte
 YOUNG
 —In the
 Matter of
 LARK.

1818.

Ex parte.
Young.
 —In the
 Matter of
 LARK.

ditors, or make any conveyance or assignment of his estate or effects in trust for their benefit, without having made such investment of said £3000 as last aforesaid, then and whenever the same should so happen, said £3000 should be and become a debt, immediately due and payable from the estate and effects of *Henry Lark*, and in no case subject to the contingency of the covenants therein before contained for payment thereof, and then and in every or any such case, it should be lawful for the petitioners and the survivors and survivor of them, and the executors, administrators, and assigns of such survivor, to claim and prove the said £3000 as a debt then actually due and payable to them or him, under any commission of bankrupt against the said *Henry Lark*, or to enter into and execute any deed or deeds of trust, or composition, conveyance or assignment for the benefit of the creditors of the said *Henry Lark* as the case might be, and to accept and take a dividend or dividends, for or in respect of such debt in liquidation or part payment thereof, but subject and without prejudice nevertheless to any remedy, or means for the recovery of the residue if any, of the said debt, together with the interest thereof, which might be otherwise had, taken, or resorted to, upon, or by virtue of the said covenant for payment thereof as aforesaid, and further that all such dividends or dividend, or other monies as should so as last aforesaid, be received by the aforesaid trustees or trustee for the time being, from the estate or effects of the said *Henry Lark*, in his life time, should be forthwith laid out and invested by the said trustees or trustee, in their or his own names or name in the public stock or funds, or upon government or real securities at interest upon trust, from time to time during the natural life of the said *Henry Lark*, to receive and pay to, or permit and empower the said *Mary Gravenor*, to receive and take

the interest, dividends and proceeds to arise therefrom, to and for her own sole and separate use and benefit, free from the controul, debts, disposal or engagements of the said Henry *Lark*, and her receipt alone, from time to time to be the proper and only sufficient discharge for the same, as if she were sole and unmarried; and from and after the decease of the said Henry *Lark* upon trust to apply the principal money so to be received, as well as the future interest, dividends, and proceeds to arise therefrom upon the same powers, provisoes, declarations, and agreements as are therein before declared, of, and concerning the said £3000 and the interest thereof, from and after the death of said Henry *Lark*, but in case the said Mary *Gravenor*, should happen to die in the life time of the said Henry *Lark*, then and in such case the said trustees or trustee for the time being, should, from and after her death in like manner from time to time invest, and lay out all the future interest, dividends, and proceeds which should thenceforth arise, and be received from the said last mentioned trust fund, during the natural life of the said Henry *Lark*, in the same or the like stocks or funds, or, upon the same or other good and sufficient securities at interest in addition and augmentation of the principal of the said trust fund; and it was thereby further agreed and declared, that the several estates and interest, and other provisions therein before created and provided, and intended to be made for her support and benefit, in the event of her surviving the said Henry *Lark*, were so created and should be taken and accepted by her, for her jointure in lieu of and bar of dower, and thirds at common law or custom, or otherwise, which she said Mary *Gravenor*, could or might claim, challenge or demand out of the real estate of said *Lark*.

1818.

Ex parte.
YOUNG.
—In the
Matter of
LARK.

By another indenture also dated 25th Nov. 1812,

1818.
Ex parte
 YOUNG.
 —In the
 Matter of
 LARK.

and made between St. Albyn *Gravenor* of the first part, the said Mary *Gravenor* of the second part, the said Henry *Lark* of the third part, William *Fletcher*, John *Parsons*, Langley St. *Albyn*, and Herbert *Parsons* of the fourth part. It was witnessed, that in consideration of the said intended marriage, and of the settlement therein before recited, to have been made by Henry *Lark*; Mary *Gravenor* did covenant and agree with the said trustees, that in case said marriage should be solemnized, that twelve shares of £100 in the Oxford Canal navigation, and £700 stock Old South Sea annuities, should within three months after the death of Mary *Gravenor* her mother, be transferred to the said trustees, upon trust to pay the dividends and interest thereof, unto Mary *Gravenor* the younger, for her separate use independant of her said husband for her life, and after her decease upon trust to pay the same unto the said Henry *Lark* and his assigns for his life, and from and after the decease of the survivor of them upon trust for the children of the said marriage in manner therein mentioned, and in default of issue upon trust for the said Langley St. *Alban*, his executors, administrators and assigns, and the said Mary *Gravenor*, did thereby further covenant with the said trustees, that her moiety of £3287 : 1 : 4 Navy 5 per cent annuities, £200 3 per cent consols, £100, and the residuary personal estate or Mary *Langley* deceased, should within three months after the death of the said St. Albyn *Gravenor* and Mary his wife, be transferred to the said trustees upon the same trusts, as are thereinbefore declared, concerning the Canal shares and Old South Sea annuities, and the said Mary *Gravenor* did thereby further covenant with the trustees, that a certain legacy of £500, to which she was then entitled, under the will of the said Mary *Langley*, and the further sum of £1500, to which she

ould become entitled on attaining the age of twenty-four years, and all other, the property and effects to which he then was, or might at any time become entitled, should be assigned to the said trustees, upon trust invest the same in the public funds, or on government or real securities at interest, and pay the interest and dividends thereof, to the said Mary *Gravenor* for her life, for her separate use independant of her husband, and from and after her decease, upon trust pay the same unto the said Henry *Lark* and his assigns for his life, and after his decease upon trust to transfer the same to such person or persons, as the said Mary *Gravenor* should by deed or will appoint, and default of appointment to the executors, administrators, and assigns of the said Mary *Gravenor*.

1818.
Ex parte
YOUNG.
—In the
Matter of
LARK.

The marriage between Henry *Lark* and Mary *Gravenor*, took effect shortly after the execution of said indenture of settlement; St. Albyn *Gravenor*, and Mary his wife are still living.

Since the marriage, the legacy of £500 and the sum of £1500, to which Mary *Lark* became entitled on attaining the age of twenty-four years, were invested in the names of the said trustees, in the purchase of 2095:11:0 navy 5 per cent annuities, upon the trust of the said indenture of settlement.

A commission of bankrupt was awarded and issued against Henry *Lark*, together with Joseph *Woodhead* of Essex Street, in the county of Middlesex, Navy Agents, under which they were duly found and declared bankrupts.

The petitioners offered to prove under the commission the sum of £3000, made proveable in case Henry

1818. *Lark* should become bankrupt, but the commissioners refused to allow the proof.

Ex parte
Young.

—In the
Matter of
Lark.

The petitioners prayed that they might be admitted as creditors for, and to prove the said £3000 under the commission.

Sir Samuel Romilly and Mr. Montagu for the petition.

In arguing this case we may admit it to be quite clear, that a contingent debt, where the contingency has not taken place at the time of the bankruptcy cannot be proved.

We may also admit that where the marriage settlement of a trader provides, that the sum settled shall become payable to the trustees, in the event of the husband's bankruptcy, it cannot be proved if the wife did not bring any fortune to the husband. But we submit it is also equally clear, that if the sum so settled were the portion of the wife, that then the trustees shall be admitted to prove under the husband's commission.

This has been determined in the Matter of *Meaghen* (a). That case is also an authority shewing where the sum settled exceeds the portion brought by the wife, the court will deduct the excess, and allow the proof for so much as the husband has actually received. If a man lend money to another to be repaid, should the borrower become bankrupt, the money so lent may be

(a) 1 Sch. and Lcf. 179.

proved under the borrower's commission. In principle such a case cannot be distinguished from the present.

1818.

Ex parte
YOUNG.
—In the
Matter of
LARK.

Mr. Cooke and Mr. Beames for the assignees.

If a man were to lend a trader money upon his bond conditioned only to be forfeited in the event of his bankruptcy, the debt could not be proved, a creditor must have a right of action at the time of the bankruptcy. But how can there be a right of action when that right is given upon an event that necessarily cannot take place before the bankruptcy.

The VICE CHANCELLOR.

I cannot bring myself to think that the proof would be refused in the case of money lent to be paid in the event of bankruptcy. I think the cases on the subject of settlement made by traders who subsequently become bankrupts amount to this. That although generally speaking, the consideration of marriage is a good consideration, and will support a settlement to any amount, yet if bankruptcy be made the event upon which the money contracted to be settled by the husband, is to be paid to the trustees, the excess of the sum settled above what the husband has received of the wife's fortune, shall not be proved under his commission. The rule is, in order to avoid the obvious opportunity of fraud, that it is only the fortune of the wife that can be settled to be paid upon that contingency, I do not mean in specific, but in amount.

Let the proof be limited to the amount of the value of the interest which the husband took under the settlement, the dividends to be capital in their hands upon the trusts of the settlement.

11th. March *Ex parte* FISHER.—In the Matter of *BARKE*
1818.

Stock secured by bond and the collateral security of real estate to be replaced at the end of three years, and in the mean time the dividends to be paid as they accrued due. The dividends are not paid, afterwards and before the expiration of the three years the obligor becomes a bankrupt. Held that the obligee was entitled to have the proceeds of the sale of the real estate immediately laid out in the purchase of stock without waiting the expiration of the three years.

BARKER by his bond bearing date the 26th. *June* 1816, had bound himself with a surety in the penalty of £1000 to replace within three years from the date thereof, £550 government stock, and in the mean time to pay the dividends upon that sum. He also entered into an agreement in writing to assign as a collateral security for the replacing of the stock, and the due payment of the dividends in the mean time, certain estates to which he was entitled.

A commission of bankrupt issued against *Barker* under which he was duly found a bankrupt. Dividends had accrued due previous to the bankruptcy which had not been paid, and it was admitted that the bond was forfeited at law. No demand previous to the bankruptcy had been made to replace the stock.

This petition was for a sale of the estate, the proceeds to be applied in replacing the stock, and to prove for the difference if the proceeds were not sufficient to satisfy the demand.

Mr. *Wetherell* and Mr. *Stephen* for the petition.

Mr. *Cullen* for the assignees contended, that the money to arise from the sale of the premises ought to be secured, and not laid out in the purchase of the stock until the expiration of the three years from the date of the bond; that the bankrupt's estates might have the benefit if the price of stock should then be fallen.

The VICE CHANCELLOR.

The bond being forfeited at the time of the bankruptcy, there was then a legal demand for the penalty. The amount of the penalty would upon proof of the debt under the commission, have been reduced upon equitable principles to the then actual value of £550 stock.

1818.

Ex parte
FISHER.
—In the
Matter of
BARKER.

The estate is a security for the sum which would have been the subject of proof, and the creditor is entitled to have his stock replaced immediately.

Ordered as prayed.

Ex parte QUANTOCK.—In the Matter of
BRIDGER.

11th. March
1818.

THIS petition prayed a declaration, that certain acts done by the assignees were an election to accept a lease of which the bankrupt was lessee.

The VICE CHANCELLOR was of opinion that the statute (a) did not empower the court to determine

The court is not empowered by the 49 Geo. 3. c. 121. s. 19. to determine the question of election of a lease by the assignees.

Assignees in possession having elected not to accept the lease an issue of

(a) 49 Geo. 3. c. 121, s. 19. "And be it further enacted, That in all cases, in which a commission of bankrupt shall be sued forth against any person af-

ter the passing this act, "and such person shall be entitled to any lease or agreement for a lease, and the assignees shall accept the same and the benefit

quantum damnificatus was directed.

1816. whether the assignees had elected. That he could only call upon them to make their election, and then all that was left for the court to do, was to settle the terms to be imposed upon the assignees, consequent to the election.

Ex parte
QUANTOCK.
—In the
Matter of
BRIDGER.

The counsel for the assignees being called upon by the Vice Chancellor rejected the lease. His Honor then called upon the counsel for the petition to shew what terms ought to be imposed upon the assignees. And upon affidavits being read shewing, that the assignees had mismanaged the farm since they were in possession, he directed an issue of quantum damnificatus.

The Solicitor General and *Mr. Perkins* for the petition.

Mr. G. Wilson and *Mr. Montagu* for the assignees.

<p>“therefrom, as part of the “bankrupt's estate and ef- “fects, the bankrupt shall “not be, or be deemed to “be, liable to pay the rent “accruing due after such ac- “ceptance of the same as “aforesaid, and after such “acceptance the bankrupt “shall not be liable to be in “any manner sued in respect “or by reason of any subse- “quent non-observance or “non-performance of the “conditions, covenants or “agreements therein con- “tained; provided that in all “such cases as aforesaid, it “shall be lawful for the les- “sor or person agreeing to “make such lease, his heirs, “executors, administrators, “or assigns, if the assignees</p>	<p>“shall decline, upon their “being required so to do, to “determine whether they “will or will not so accept “such lease or agreement for “a lease, to apply by peti- “tion to the Lord Chancel- “lor, Lord Keeper, or lords “commissioners of the great “seal, praying that they “may either so accept the “same, or deliver up the “lease or agreement for the “lease, and the possession of “the premises demised or “intended to be demised, “who shall thereupon make “such order as in all the “circumstances of the case, “shall seem meet and just, “and which shall be bind- “ing on all parties.”</p>
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Ex parte PARR. { In the Matter of BRICKWOOD 12th March
and Co.—In the Matter of LEIGH. 1816.

IN 1810, *Leigh* had a drawing account with *Brickwood* and Co. and remitted bills to them as a deposit to cover his account.

Leigh also kept an account with the petitioners *Parr* and Co. bankers at *Warrington*.

On the 6th *July*, 1810, a commission issued against *Brickwood* and Co. and they were declared bankrupts.

In *May*, 1811, *Leigh* also became a bankrupt. At the date of *Brickwood* and Co.'s commission they had accepted bills drawn by *Leigh*, to the amount of £20,784 : 9 : 1, which were then outstanding. These bills had been paid by *Leigh* to *Parr* and Co. for a valuable consideration. The petition stated that upon the bankruptcy of *Brickwood* and Co. their assignees possessed themselves of some of the deposited bills to the amount of £10,523 : 8 : 11, and that the same or the proceeds were then in their hands. That a short time before their bankruptcy, *Brickwood* and Co. without the consent of *Leigh*, parted with others of the bills of exchange, so deposited with them as short bills, together with other bills in which *Leigh* had not any interest, and received in lieu thereof a bill of exchange to the amount of £6,500, which bill of exchange for £6,500, came into the possession of the assignees who received payment thereof.

The drawer of bills of exchange deposits short bills with the acceptor to cover his drawing account. The drawer and acceptor become bankrupts. The holder of the acceptances can call upon the assignees of the acceptor to apply the short bills in discharge of the acceptances to the extent of the lien, which the acceptor had upon them at the time of his bankruptcy. To ascertain that lien an enquiry directed.

1818. That the account between *Leigh* and the said *Me*
Ex parte *Brickwood* and Co. at the time of their bankruptcy
PARR. stood as follows.
 —In the *Cr.* *Brickwood and Co.*
 Matter of *Brickwood*
 and Co.
 —In the
 Matter of
LEIGH.

Acceptances unpaid £20,784 : 9 : 1

Cash £12,898 : 17 : 1
 Short bills in hand 10,000
 Substituted bills,
 part of £6,500.
 Other bills of ex-
 change passed
 away by *Brick-*
wood and Co.

That the petitioners proved the said acceptances the amount of £20784 : 9 : 1, under the commission against *Brickwood* and Co. and received dividend thereon to the amount altogether of 1s. 11d. in the pound. And the petition prayed that on reducing the aforesaid proof to the said sum of £12,898 : 17, such further sum as, upon taking the accounts, might appear to be just, the assignees of *Brickwood* and Co. might deliver and pay to the petitioners for their use the several bills of exchange or their proceeds possessed by them, and then in their possession power, and all future benefit and advantage to be derived therefrom. And also that the assignees of *Brickwood* and Co. might pay over to the petitioners such proportion of the said sum of £6500, received of them as the bill or bills of exchange deposited with *Brickwood* and Co. and by them applied in obtaining the bill which produced the said amount bore to all bills of exchange, or other things which produced the said amount.

It appeared by the affidavit of *William Morgan*, one of the partners in the house of *Brickwood* and Co. that previous to the 6th July, 1810, *Leigh* had a drawing account with *Brickwood* and Co. and from time to time delivered to, and deposited with them, on

drawing account, bills of exchange, which were from time to time placed to his credit; and that he was at liberty to draw, and did from time to time draw bills of exchange upon *Brickwood* and Co. on the said account, which were accepted by them. That *Leigh*, at different times, down to the month of *July*, 1810, remitted to *Brickwood* and Co. bills of exchange, amounting altogether (including the bill for £4000 after mentioned) to £39,398 : 9 : 6, part whereof, amounting to £21212 : 6 : 5 (including the said bill of £4000) were passed away by *Brickwood* and Co. previously to their bankruptcy, and were all paid excepting two, one for £1849 : 4 : 3, and the other for £817 : 13 : 4, but were not indorsed by *Brickwood* and Co. That the assignees of *Brickwood* and Co. returned to *Leigh*, previously to his bankruptcy £7659 : 0 : 2, further part of the said bills of £39,398 : 9 : 6. That *Leigh* drew several bills of exchange upon *Brickwood* and Co. amounting in the whole to £25,784 : 9 : 1, which were accepted by *Brickwood* and Co. and became due after their bankruptcy, and were not paid by them. That one of the said acceptances, amounting to £5000, was returned by *Leigh* previously to his bankruptcy to the assignees of *Brickwood* and Co. leaving the amount of the said acceptances outstanding, £20,784 : 9 : 1. That in addition to the acceptances of £20,784 : 9 : 1, *Brickwood* and Co. previous to their bankruptcy, delivered to *Leigh* four several bills of exchange, amounting altogether to £8,646 : 5 : 0. That one of the said bills of £8,646 : 5 : 0, delivered to *Leigh*, being a bill of £2500, was returned by *Leigh* to the assignees of *Brickwood* and Co. subsequently to the bankruptcy, leaving the amount of such bills paid to *Leigh* £6146 : 5 : 0. That the assignees of *Brickwood* and Co. have in their possession bills to

1818.

Ex parte

PARR.

—In the
Matter of
BRICKWOOD
and Co.

—In the
Matter of
LEIGH.

1818.

Ex parte
PARR.—In the
Matter of
BRICKWOOD
and Co.
—In the
Matter of
LEIGH.

the amount of £40,527 : 8 : 11, including the proceeds of a bill on *Sill* and Co. for £1215 : 6 : 6, which was paid, being the remainder of the said bills of £39,399 9 : 6. That some time in the month of *June*, 1810, the deponent on behalf of himself and his partners, gave to one John Fairweather *Harrison* certain bills of exchange, and amongst them a bill on *Mc Evoy* therein after mentioned for £6,500, which the deponent had received from *William Coles* in exchange for certain bills then received, from the said John Fairweather *Harrison*. That being afterwards desirous to get back the said bill of £6,500 on *Mc Evoy*, the deponent applied to the said J. F. *Harrison* to return him the same, and in lieu thereof, agreed to give to the said John F. *Harrison*, and on or about the 4th day of *July*, 1810, did give him the said bill of exchange for £4000 thereinbefore mentioned, and being one of the bills so deposited by *Leigh* with *Brickwood* and Co. together with two other bills of exchange for £1,466 : 10, and £1468 : 3 not the property of *Leigh*, making together £6,936 : 13, and the said John F. *Harrison* as the deponent, believed delivered the same to Messrs. *Newnham*, *Everitt*, and Co. bankers in London, to whom he had previously delivered the bill on *Mc Evoy* for £6,500, and at the same time received back from them the said bill for £6,500 on *Mc Evoy* (being the bill for £6,500 mentioned in the petition, which said bill of £6,500 on *Mc Evoy*, was afterwards delivered by the said John F. *Harrison* to *Brickwood* and Co. the same subsequently came into the hands of their assignees.

Mr. *Wetherell* and Mr. *Horne* for the petition.

This case cannot be distinguished from that of *Ex parte Waring* (a). The Lord Chancellor there con-

(a) 2 *Rose*, B. C. 182.

considers the payment of persons holding acceptances, to answer which short bills have been deposited, rather as an arrangement of the equities between the estates, than as being strictly a demand. It is quite clear, that *Brickwood* and Co. could have no property in these bills, and *Leigh* might have demanded them to be delivered up to him upon indemnifying their estate against the acceptances. We are holders of the acceptances for a good consideration, and entitled to stand in *Leigh's* place. *Ex parte Waring* has settled this point.

1818.
Ex parte
PARR.
 —In the
 Matter of
BRICKWOOD
 and Co.
 —In the
 Matter of
LEIGH.

Mr. Cooke for *Leigh's* assignees.

The question here is whether the facts of this case do not take it out of the principle of the decision in *Ex parte Waring*. There, the acceptances were outstanding, and *Brickwood's* estate had not the means of satisfying them, without applying the bills remitted by *Bracken* to that purpose. But in the present case, *Brickwood's* house at the bankruptcy, had received from *Leigh* funds much more than sufficient to satisfy the outstanding acceptances. *Leigh* had remitted short bills to the amount of £39,398 : 9 : 6. Of these bills *Brickwood's* house had passed away, and converted into cash to their own use, previous to the bankruptcy £21,212 : 5, the amount of all the outstanding acceptances was £20,784 : 9 : 1, which deducted from the former sum leaves a residue of £427 : 15 : 11. *Brickwood* and Co. had therefore actually received out of the short bills £427 : 15 : 11 more than sufficient to satisfy the outstanding acceptances, and *Leigh* at the time of their bankruptcy, had a right to have delivered up to him the residue of the short bills remaining in their hands.

1818.

Ex parte
PARR.—In the
Matter of
BRICKWOOD
and Co.—In the
Matter of
LEIGH.

Mr. *Wetherell* in reply, insisted that the whole of the bills made one entire pledge, and though part of them might have been reduced into cash, that did not make the remainder the less a pledge.

The VICE CHANCELLOR.

In *Ex parte Waring*, the Lord Chancellor proceeds entirely upon the idea, that *Bracken* and Co. could not have withdrawn the bills without leaving sufficient to satisfy the outstanding acceptances. The whole equity in that case consisted in the short bills being specific property in the hands of *Brickwood's* assignees to satisfy the acceptances. The holders of the acceptances called upon the assignees to apply them to that purpose, and the Lord Chancellor was of opinion that they ought to be so applied. The single question here is, whether *Brickwood* and Co. had a right to apply any of these short bills in discharge of the acceptances; and if, according to the statement of Mr. *Cooke*, they had previously received the sum of £21,212 : 5, which was applicable to the payment of the acceptances, they could have no right to pay the acceptances with the remaining short bills.

Upon Mr. *Wetherell's* suggestion that it did not clearly appear by *Morgan's* affidavit, that *Brickwood's* house had received and applied to their own use the whole of the £21,212 : 5; the Vice Chancellor was of that opinion, and said, I am not sure from the affidavit, that *Brickwood* and Co. were in possession of the cash arising from the bills stated to have been passed away. But supposing they were in cash to that amount, there might still be a state of the account, which would give them a lien upon the remaining bills. For the cash which they received was not merely applicable to

satisfy the acceptances, but also the additional credit given to *Leigh* to the amount of £8,146 : 5.

1818.

Ex parte
PARR.

Refer it to the Master to enquire whether *Brickwood* and Co. had at the time of their bankruptcy any, and what lien upon the short bills in their hands.

—In the Matter of *BRICKWOOD* and Co.
—In the Matter of *LEIGH*.

Ex parte WILKINSON.—In the Matter of
WILKINSON and GOODALL.

1818.
12 March,

THE object of this petition was to charge the assignees under the 49 Geo. III, c. 121, s. 4. with 20 per cent upon the sums of £1950 and £490, alledged to have been employed by them contrary to the provisions of the act. It appeared that the assignees had paid into the banking-house, which had been duly appointed for that purpose, the monies arising from the estate as they received them. That they had employed as their agent, one *Tinson* in the management of the bankrupt's affairs, and that they had directed him to purchase for the benefit of the estate, exchequer bills to the amount of the said two sums of £1950 and £490, and for that purpose had given him checks upon the bank. *Tinson* received the money at the bank, and instead of applying it as he was ordered, converted it to his own use, but subsequently he replaced the money in the bank.

Assignees give checks upon the banker of the estate to an agent, to enable him to purchase exchequer bills for the benefit of the estate. The agent receives the money at the bank and converts it to his own use. The money is subsequently replaced in the bank. Held that the assignees are not under the 49 Geo. 3rd c. 121, s. 4. chargeable with 20 per cent upon the monies so misapplied by their agent.

Sir Samuel Romilly and Mr. Lovat contended, that according to the act, the monies arising from the bankrupt's estate were not only to be paid into the bank, but were to remain there, and that the assignees could

1818. *Ex parte*
WILKINSON.
 —In the
 Matter of
WILKINSON
 and
GOODALL.

not draw the money out when paid in, without being guilty of a breach of the duties imposed upon them by the statute, any more than they could neglect to pay it in. It was not an answer to say, the assignees intended to lay the money out in exchequer bills, for they had not the power to make such an investment. The only way by which the bankrupt's estate could be so invested, was pointed out by the 7th section of the act, which authorizes the commissioners upon a proper application to direct such an investment.

Mr. *Hart*, Mr. *Bell*, and Mr. *Montagu* for the assignees were stopped by the court.

THE VICE CHANCELLOR.

This petition presents to the court a general question which it is not necessary to answer in the case actually proved. The single consideration is whether the assignees have so retained two sums of £1950 and £490 as to subject them to interest within the statute. The third section of the statute recites a former act, and the mischief that had in many instances arisen from creditors not availing themselves of the power given to them, and from assignees disobeying the directions of that act. To prevent such mischief for the future, certain powers are given to the commissioners; and in order the more effectually to secure the good conduct of assignees, the fourth section makes a provision in cases of misconduct, of which the estate is to have the benefit. (His Honor here read the 4th section) (a). What is the evil sought to be avoided?

(a) 45 Geo. 3rd. c. 121, s. 4. "acted by the authority a-
 4. "And be it further en- "foresaid, That from and

The evil is the assignees wilfully retaining or employing for their own benefit any part of the bankrupt's estate. The intention of the enactment is to guard against the corrupt motive of the assignees. Has there been any corrupt motive influencing these assignees in this case? It appears they paid into the bank all which they received. They did not retain one shilling of the estate. They had an agent of the name of *Tinson*, and they state the circumstances that induced them to employ him. The motives are such as might have induced any prudent man so to act. They direct this agent to lay out £1,950 and £490 in the purchase of exchequer bills, and give him checks upon the bankers for that purpose. This agent proves unworthy of the trust reposed in him, and converts the money to his own use. The money has since been replaced. It is now said that the assignees are to

1818.

Ex parte
WILKINSON.
— In the
Matter of
WILKINSON
and
GOODALL.

“ after the passing of this
“ act, in all cases in which
“ any assignee or assignees
“ of any bankrupt's estate,
“ shall wilfully retain in his
“ or their hands, or otherwise
“ employ for his or their own
“ benefit, any sum or sums
“ of money, part of the es-
“ tates of such bankrupts
“ contrary to the aforesaid
“ direction of the said re-
“ cited act, passed in the
“ fifth year of the reign of
“ King George the second,
“ or of the aforesaid direc-
“ tion in this act contained,
“ he or they shall be charged
“ in his or their accounts
“ with the estates of such
“ bankrupts, with such sum
“ or sums of money as shall
“ be equal to the amount of
“ interest, computed at the
“ rate of twenty pounds per
“ centum per annum, on all
“ such sums of money so re-
“ tained or employed by him
“ or them, for the time or
“ times during which he or
“ they shall have so retained
“ or employed the same,
“ contrary to the said direc-
“ tion of the said acts or
“ either of them; and the
“ commissioners of ban-
“ krupts are hereby required
“ to charge such assignee or
“ assignees in their accounts
“ with such sum or sums of
“ money accordingly.”

CASES IN BANKRUPTCY.

1818. be charged with interest in respect of the employ-
Ex parte ment of the money by their agent. But the act gives
 WILKINSON. interest only where the assignees wilfully retain, or
 —In the otherwise employ the money for their own benefit; and
 Matter of this case is neither within the letter nor the spirit of the
 WILKINSON and act. Dismiss the petition without costs, and let the
 GOODALL assignees retain their costs out of the estate.

◆

12 March,
 1818. *Ex parte* PEYTON.—In the Matter of—

One of two partners the other being abroad proves a debt and dies. Service of the petition to expunge the debt upon the attorney appointed to receive the dividends ordered to be good service upon motion.

MR. LOVAT had applied by motion to the Vice Chancellor, that service of the copy of a petition to expunge a debt upon the creditor's attorney might be good service. The motion was made upon an affidavit disclosing the following facts, namely, that the debt in question had been proved under the commission by one of two partners to whom it was alleged to be due. The partner who proved the debt was dead, and the surviving partner lived abroad. An attorney had been appointed to receive the dividends. The Vice Chancellor had made the order, but the officer thinking that the application ought to have been by petition and not by motion did not draw it up.

Mr. Lovat this day again mentioned the case.

The VICE CHANCELLOR.
 Strictly speaking, every application in bankruptcy

ought to be by petition, but I made the order upon the authority of the case before the Lord Chancellor, which was cited by Mr. *Lovat* (a).

1818.
Ex parte
PEYTON.
—In the
Matter of

(a) *Ex parte Anderson, Ante 38.*

Ex parte DURENT.—In the Matter of ENFIELD. 13 March, 1818.

THIS was a petition to be admitted to prove a debt, and to remove assignees on the ground that the proof was improperly rejected, and that if admitted, it would have turned the choice of the assignees.

It is not a ground for the removal of assignees that the commissioners have improperly rejected the proof of a debt that would have turned the choice unless the rejection was fraudulent.

Mr. *Cooke* and Mr. *Cullen* for the petition.

THE VICE CHANCELLOR.

I think the commissioners were right in not postponing the choice of assignees. And it would lead to extreme inconvenience if the choice of assignees was to be declared void whenever the commissioners reject the proof of a creditor whose vote would have altered the choice. Assignees are not to be removed because commissioners improperly reject a proof, unless it appear that the proof was fraudulently procured to be rejected, with a view to influence the choice of assignees (a). In this case however the commissioners did not reject the proof of the debt: They have rejected the evidence tendered in support of the proof.

(a) Trin. T. 1818. upon a petition to prove a debt and Mr. *Wetherell*, for the peti-

1817.

Ex parte

DURENT.

—In the
Matter of
ENFIELD.

Let the petition stand over that you may have an opportunity of going before the commissioners to establish your proof.

tion as to the latter part of the prayer contended that as the petitioners were principal creditors, and as the commissioners had refused their proof there ought to be a new choice of assignees.

The Vice Chancellor was of opinion it never was an objection to a choice of assignees, that some creditors were excluded by the judgment of the commissioners,

who, if they had been allowed to prove their debts, would have had great weight in the choice, unless it could be shewn they had been excluded by some improper conduct or fraud practised upon the commissioners.

Sir Samuel Romilly and Mr. Roots for the respondents.

Ex parte Thompson.—In the matter of *Mathieson*,

LINC. INN.
11th & 14th
March.
1818.

Ex parte RICHARDSON.—In the Matter of
HODSON.

If an executor who is directed to carry on his testator's partnership trade exceeded his authority, by employing the assets in the trade to an extent not warranted by the will, and the surviving partner and the executor become bankrupt, the excess of the assets so employed may be proved by the executor under their commission,

JAMES HODSON and James *Hargreaves* of *Liverpool*, Brewer, entered into partnership in the business of Timber Merchants, which they carried on till the death of the said James *Hargreaves*, that happened 12th day of *September*, 1812, under a certain indenture bearing date the 25th day of *March*, 1808, under their hands and seals, wherein it was recited, that they had been from the 13th of *Oct.* then last, and had agreed to continue co-partners and joint traders in the business of Timber Merchants for the term of fourteen years, commencing on the said 13th *Oct.* in the manner and upon the terms thereafter mentioned. And reciting an agreement to advance

unto one joint stock the following sums, viz. the said James *Hodson* in the value of timber and in cash £3000, and the said James *Hargreaves* £5000, amounting together to £8000, which it was agreed should be the capital for carrying on the business. It was by the said indenture witnessed that it was thereby mutually covenanted, granted, concluded, and agreed between them, and each of them by and for himself, his executors, and administrators, did thereby covenant, promise and agree to and with the other of them, his executors and administrators in manner following, that is to say, that they should and would continue and be co-partners and joint traders in the said trade or business of a timber merchant, and in the buying and selling of all sorts of goods, wares, merchandize, and other things incident and belonging thereto, for, and during, and unto the full end and term of fourteen years commencing as aforesaid, if both the said parties should so long live, subject nevertheless to the proviso thereafter contained. And amongst other things it was agreed, that before any division of profits were made between the said parties, there should be paid to the said James *Hodson*, for the use and occupation of certain premises, the clear annual sums therein mentioned, and that the said James *Hargreaves* should have and receive annually lawful interest upon the sum of £2000 of the money by him advanced into the said concern, and that all expences attending the business, and that all losses which might happen in the prosecution thereof, should be equally borne between the said parties; that the accounts of the said partnership should on a certain day in each year, during the said partnership be settled and signed by the said parties to the end, that it might appear and be ascertained in what state the partner-

1817.

Ex parte
RICHARDSON
—In the
Matter of
HODSON.

1818.

Ex parte
RICHARDSON
 —In the
 Matter of
HODSON.

ship stood, as to profits and losses by the preceding year's trade. That in case of profit after the allowance thereinbefore mentioned for rent and interest to the said James *Hargreaves*, upon the sum of £2000, out of the net profits the sum of £10 per cent on the whole should be annually taken by the said James *Hodson*, by way of compensation for his skill and trouble in the management of the said business, and the balance of the profits should be added to the said capital or sum of £8000 annually, (unless the said parties should agree between themselves otherwise to dispose of the same) until the capital of each of the said parties should amount to the sum of £10,000, and from that time until the end, or other sooner determination of the said co-partnership, by the death of either, or otherwise as mentioned in the proviso thereafter contained should be equally divided between the said parties, or between the survivor and the representatives of the deceased partner, when the capital should also be divided between them, according to their interests therein. And each of the said parties for himself, his executors, and administrators, did covenant, promise, and agree with the other of them, his executors and administrators, that each of them, his executors, and administrators should and would well and truly perform, and keep all, and singular the covenants, provisions and agreements thereafter mentioned, on his and their parts, and behalves to be performed and kept according to the true intent and meaning of those presents. And it was thereby provided, declared and agreed, by and between the parties thereto, that in case of the death of the said James *Hodson*, the said partnership should immediately cease. But that in case of the said James *Hargreaves* departing this life before the expiration of the said term, the co-partner-

ship should be continued between the said James ^{1812.} ~~Todson~~, and such person as he the said James ^{Ex parte} ~~Hargreaves~~, should by any writing in his life time under ^{RICHARDSON} his hand, or by his last will and testament, declare to ^{—In the} his successor in the said concern until the end of the ^{Matter of} said term. Nevertheless, it should be in the power of ^{HODSON.} the said James *Hargreaves* by any such writing or will, to determine the said co-partnership with his death, and in that case the accounts of the said concern should immediately be adjusted and settled as therein mentioned.

James Hargreaves duly made and published his last will and testament in writing, bearing date the 9th day of June, 1812, whereby he gave, devised and bequeathed to the trustees therein named, all his real and personal estate, upon certain trusts therein mentioned. And after declaring the said trusts, and after every disposition of his property contained in his said will, except a legacy of £90 to his maid servant, and legacies of £50 to his executors, he inserted the following declaration, “I direct, that my executrix and
“ executors, shall be my successors for the benefit of
“ my estate, in a business which I now carry on in
“ partnership with James *Hodson* of *Liverpool*,
“ Timber Merchant, under certain articles of partner-
“ ship.” And he then appointed his wife to be execu-
trix, and certain persons therein named, executors of
his said will, and added the following indemnity for
his executors, “I also declare, that my said executors,
“ or any of them shall not be chargeable with, or ac-
“ countable for any losses which may happen to my
“ estates, so as such losses happen without their wil-
“ ful neglect or default; nor for more than they shall
“ severally actually receive, nor one of them for an-

1818. “ other of them, nor for the acts or defaults, receipts,
 “ or disbursements of another, but each of them for
Ex parte “ his and her own acts, deeds, defaults, receipts and
RICHARDSON “ disbursements only, and that they shall and may re-
 —In the “ tain and reimburse themselves respectively, all such
 Matter of “ costs, charges, and expences as they, or any of them
 HODSON. “ shall expend, or be put unto in the performance of
 “ this my will.”

On the 16th day of *June*, 1813, the said *Mary Hargreaves*, alone proved the said will of the said testator *James Hargreaves*.

At the time of the decease of the said *James Hargreaves*, there was due to him on the balance of his account of capital brought into the said joint concern the sum of £7145 : 18 : 11, and to the said *James Hodson*, the sum of £2377 : 13 : 5 exclusive of their respective shares of the profits of the said business, which were also adjusted up to the time of the decease of the said *James Hargreaves*, and which appeared by the books to have been £18,567 : 1 : 10, but some of the debts then owing to them afterwards became bad or doubtful to the amount of between £2000 and £3000.

In the beginning of the year 1815, the co-partnership sustained a very heavy loss by a fall in the price of timber, and otherwise in the course of their trade, and the said *James Hodson* applied to *Mary Hargreaves* for a further advance of money, and represented to her that their bankers were rather sharp on them and that they, meaning the partnership, should be obliged to advance some money, but that he thought £10,000 would enable them to get through, and in consequence of this application the said *Mary Hargreaves*, as the execu-

trix of her husband, sold stock in the public funds, which produced £9,064 : 2 : 8, and which sum was paid to the said James *Hodson*, and for which the executors had credit in the partnership books, in the account which contained the account of capital advanced by the testator in his life time. In a short time afterwards she made a further advance to the concern of £2,630 : 3 : 11, which also arose from a sale of part of the testator's stock sold for that purpose, and for which credit was given to the executors in the account last mentioned.

1818.
Ex parte
 RICHARDSON
 —In the
 Matter of
 Hodson.

Between the times of advancing the aforesaid sums of £9064 : 2 : 8 and £2630 : 3 : 11, a security was executed by the bankrupts to the trustees in a settlement made previous to the marriage of the testators daughter Mary *Hargreaves*, then a minor, with Thomas *Raffles*, which took place on or about the 17th April, 1815, for the sum of £2,850, on certain real property belonging to the said co-partnership, purchased with their funds, and which security was given in part of the sum of £5000, bequeathed by the testator for the benefit of his said daughter.

A commission of bankrupt under the great seal of Great Britain, was on or about the 24th day of August, 1817, awarded and issued against the said James *Hodson* and Mary *Hargreaves*, by the names and description of James *Hodson* and Mary *Hargreaves* of *Liverpool*, timber merchants, carrying on business in co-partnership under the firm of James *Hodson* and Co. under which the said James *Hodson* and Mary *Hargreaves* were found and declared bankrupts, and the petitioners were chosen the assignees of their estate and effects.

1818. At a meeting of the commissioners the said Mary *Hargreaves* appeared and proved a debt under the *Ex parte* said commission of £8,844 : 6 : 7 for so much money *RICHARDSON.* by her as such executrix of the said James *Hargreaves* —In the deceased, lent and advanced out of the estate of the *Matter of* said James *Hargreaves* to herself and the said James *Hodson.* *Hodson* in co-partnership before the bankruptcy, and such proof was made in respect of the said two sums of £8064 : 2 : 8 and £2630 : 3 : 11, after deducting therefrom the amount of the security so given to the trustees named in the settlement made previous to the said marriage of the testator's daughter. The petition prayed that the proof of the aforesaid sum of £8,844 . 6 : 7 might be expunged.

Sir Samuel *Romilly*, Mr. *Cooke*, and Mr. *Bickerseth* for the petition.

By the law of France and also by that of Ireland, there may be a partnership limited to a certain sum, but that cannot be done by our law. In this case the testator had a power under the partnership articles of naming his successor. He has done so. He says, my estate shall be my successor. Now supposing he had named a stranger, the sum left to be used in the trade, would have been subject to the demands of the creditors, and the stranger would have been liable to the extent of the whole of his fortune ; we say the whole of the testator's assets were liable to be used, and if it be so, the executrix cannot prove for that which she has brought in from the assets. The bequests to the son and daughter are not specific, but are given out of the general personal estate of the testator. In this case it is not necessary to consider the effect of a testator's directing his executor to carry

On his trade for an indefinite period of time, nor how far such a direction would make legatees to the extent of their legacies, liable as sureties to the creditors of the trade. The partnership is for a limited period, and it is very probable that the testator did not contemplate the distribution of his estate till the expiration of the partnership. In *ex parte Garland (a)* the Lord Chancellor expressly says, that a residuary legatee cannot withdraw his legacy from the liability to the creditors of the trade; and in *Hankey v. Hammock (b)* the general assets of the testator were ultimately subject to the debts contracted in the trade.

1818.
Ex parte
 RICHARDSON.
 —In the
 Matter of
 HODSON.

Mr Bell and Mr. Spence, in support of the proof, relied upon the judgment of the court in *ex parte Garland*, which they contended governed the present case.

The VICE CHANCELLOR.

An executor carrying on his testator's trade, pledges to the creditors of that trade his own responsibility. In addition to his personal liability, the trust fund committed to him for the purposes of the trade by the testator is also pledged. In cases of this nature, the material enquiry therefore is, to what extent has the testator authorized the executor to employ his assets in the trade. If the executor do not go beyond his authority, then the assets employed by him in the trade can never be proved under the commission, they are a part of the capital of the trade to pay its debts; but on the other hand, if in breach of his trust he make use of the assets in the trade to an extent not authorized by the will, the excess so employed may be proved as a debt under the

(a) 10 Ves. 140. register's book. See *Infra*
 (b) The counsel for the 210, and 1 Cooke, B. C. 75,
 petitioners stated this case there called *Hankey v. Ham-*
 from a note taken from the *mond*.

1818.
Ex parte
 RICHARDSON.
 —In the
 Matter of
 HODSON.

the commission. It is the same thing as if the executor had employed the assets of another estate in the trade. Both the cases cited at the bar fall within this principle. In *ex parte Garland*, the executrix had not only made use of the fund entrusted to her management, but also a further sum of £768. 12. 4. In the result of that petition, the Lord Chancellor allowed a proof to that amount. He could only have done so upon the principle I have stated. The employment of the £768. 12. 4. was a breach of trust. In *Hankey v. Hammock*, Lord Kenyon was of opinion, that the testator authorized the employment of the whole estate in the trade. Upon looking into this will, I cannot find any authority given to the executor to add to the capital employed in the trade at the time of the testator's death from his other effects. By the partnership articles, the profits were to accumulate till the shares amounted to £10,000; but there was no stipulation that the partners should bring in money to make up that sum, and the executors were not empowered to employ the assets for that purpose. Upon the whole, I am of opinion it was the intention of the testator that his executors should not employ in the trade any part of his personal estate which they did not find so employed at the time of his death; and that the executrix, by acting in a contrary manner, has been guilty of a breach of trust.

Petition dismissed.

HANKEY v. HAMMOCK. (a)

Came on first to be heard before Lord Kenyon on the 2nd. Dec. 1784.

J. Jackson, a corn chandler and lighterman, made his will 29th. Dec. 1777, and thereby, after directing

(a) From the register's immediately preceding book, as cited in the case

Payment of his debts and funeral expences, bequeathed 1818.
to his children some pecuniary legacies, and appointed HANKEY
the defendants, John *Ruse* and Thomas *Jackson* joint v.
executors; and as concerning the residue of his effects HAMMOCK.
and estate, both real and personal, he devised and be-
queathed the same unto his wife, the defendant, Sarah
Hammock, for her own use for her life, provided she
should so long continue his widow; and desired that she
should carry on his trade and business for the benefit of
herself and children; and from and after the decease or
marriage of his wife, or if she should enter into partner-
ship after his decease, then he directed his said execu-
tors to sell all his residuary effects and personal estate,
and to lay out the monies arising from the sale thereof
in the public funds or other good security, as his said
executors should think fit, and to apply the interest and
profits thereof for the benefit of his children. And the
said testator directed, that if upon examination of his
business, and a strict enquiry into the state of his affairs,
it should be found that his trade should be declining and
in a losing way, then all his said residuary interest, ex-
ccept his buildings which he held by lease, should be sold,
and his said buildings let by his executors for the benefit
of his wife and children, until the youngest of the chil-
dren should attain the age of 21 years; and that the
same should be subject to, and under the like directions
and appointments as his residuary estate.

The defendants, *Ruse* and *Jackson*, proved the will.
 The widow, by the permission of the executors, entered
 upon the leasehold premises and the stock in trade, and
 she carried on the trade for two years.

In the course of carrying on the trade by the widow,
 she became indebted to the plaintiffs and to several other
 persons in considerable sums of money. The executors,

1818. *Ruse and Jackson*, in the year 1786, thought proper to put a stop to the defendant, Sarah *Hammock*, carrying on the trade, as being a losing concern; and in consequence thereof, possessed themselves of the whole, or so much of the stock and effects then used in the said trade, as they could, and sold the stock and effects so employed in the said trade at the time the same was stopped.

HANKEY
v.
HAMMOCK.

The debts due to the plaintiffs were contracted only in the course of the trade and for the benefit thereof, upon the credit of the said testator's will.

The Master of the Rolls directed an enquiry.

1st. Whether any and what debts of the testator, at the time of his death, remained due and unsatisfied.

2nd. What debts were contracted by the said defendant, Sarah *Hammock*, in carrying on the said trade since the said testator's death, and the amount thereof.

3rd. What was the value of the stock in trade, debts, goods, and effects, possessed by the said defendants, *Ruse and Jackson*, at the time they stopped and put an end to the said trade, and distinguish how much then belonged to the said testator at the time of his death, and how much was acquired by the said defendant, Sarah *Hammock*, in the course of carrying on the said trade or business after the testator's death.

The master made his report 17th. *July*, 1786, and reported—

1st. That no debts due at the time of the testator's death had been proved before him.

2nd. That several debts had been proved before him to be due and owing by the said defendant, Sarah *Hammock*, as debts contracted by her in the course of carrying on the trade and business, amounting to £656. 2. 7.

3rd. That the said defendants, *Ruse* and *Jackson*,
received for the value of the stock in trade, goods, debts,
and effects, belonging to the said testator at the time of
his death, amounted to £672. 10. But the executors
had disbursed £173. 5. leaving a balance of £499. 5.

1818.
HANKEY
v.
HAMMOCK.

4th. That the defendants, *Ruse* and *Jackson*, re-
ceived as and for the value of the said stock in trade,
debts, goods, and effects, acquired by the defendant,
Sarah Hammock, in the course of carrying on the said
trade, amounting to £801. 13. 8.—from which, deduct-
ing disbursements, £113. 19. 10. left a balance of
£687. 13. 10.

The cause came on for further directions on the Mas-
ter's report on the 30th. *November*, 1786, when his Honor
decreed that it be referred back to the Master to tax the
plaintiffs their costs of this suit from the date of the
order 28th. *July*, 1784, and to tax the defendants their
costs prior and subsequent to the said order; and that
such costs, together with what is certified to be due
from the defendant, *Sarah Hammock*, to the several
creditors named in the first schedule to the Master's re-
port, dated the 17th. *July*, 1786, for their respective
debts be paid to them respectively by the said defend-
ants, *John Ruse* and *J. Jackson*, out of the sum of
£687. 13. 10. certified by the Master's report to be the
balance due from them on account of the value of the
stock in trade, debts, goods, and effects, acquired by the
said defendant, *Sarah Hammock*, after the death of the
said testator, *John Hammock*. And in case the aforesaid
sum of £687. 13. 10. should be insufficient for payment
of the said costs and debts, it is further ordered that such
deficiency be paid by the said defendants, *Ruse* and
Jackson, out of the assets of the testator.

13 March, *Ex parte* BUCKLAND.—In the Matter of THICK.
1818.

The 33 Geo. 3. c. 54, s. 10, only applies to cases where the officer of the friendly society has, by virtue of his office, been entrusted with the monies and effects of the society. **T**HIS was a petition by the members of a benefit society, under the commission of the clerk of the society, who had become bankrupt.

Mr. *Bell* and Mr. *Richards* opposed it, because it was sworn the clerk was not the person authorized by the society to receive the money, and that upon its being claimed from him as a debt, he had given security for the repayment of it to the society.

Mr. *Roupell* for the petition.

The VICE CHANCELLOR.

This petition must be dismissed, on the ground that the bankrupt was not the proper person to receive the money. It is not sufficient to shew that he was an officer of the society, it must appear that he was entrusted with the money in virtue of his office. (*a*)

Petition dismissed without costs.

(*a*) See 33 Geo. 3. c. 54, s. 6.

Ex parte ATKINSON.—In the Matter of
GOODCHILD.

14 March,
1818.

MR. *Bell* for the petitioner asked for his costs.

The general rule in bankruptcy is, that if the petitioner do not pray his costs he cannot have them.

The VICE CHANCELLOR.

Does the petition pray them? The general rule in bankruptcy is, that you cannot have them unless you pray them.

The petition did not pray costs and accordingly they were not given.

Ex parte RATHBONE.—In the Matter of
BROWNE.

14 March,
1818.

GEORGE and Henry *Browne* of *Liverpool*, merchants, being in the month of *January*, 1793, indebted to *William Rathbone* and *Robert Benson* in the sum of £1306. 2. 3. for goods sold and delivered, gave them an order or cheque upon their bankers, *Charles Caldwell* and Co. to pay them the said sum of £1306. 2. 3. in a bill payable three months after date.

A. being indebted to B. gives him a check upon his bankers to pay him in a bill at three months. The bankers draw a bill for the amount upon their correspondents in London, who accept it. The drawers and acceptors become bankrupt, and B. proves and receives a dividend under both commissions. Held that B. was entitled to prove his debt also under A's commission.

Charles Caldwell and Co. in pursuance of the order, drew a bill of exchange for that sum on their correspondents in *London*, *Burton*, *Forbes*, and *Gregory*, dated 12th. *January*, 1793, and payable three months after date to the order of *William Rathbone* and *Robert Benson*.

1818. The bill of exchange was not endorsed by the
Ex parte Brownes. It was duly accepted by *Burton, Forbes,*
RATHBONE and *Gregory*; but before it became due and payable,
 —In the commissions of bankrupt issued against the drawers
Matter of and acceptors of the said bill respectively, and also
BROWNE, against *George Browne* and *Henry Browne*, where-
 upon they had been severally duly declared bank-
 rupts.

William Rathbone and *Robert Benson* proved the amount of the bill as a debt under the commission of the drawers and acceptors, and received dividends in respect thereof under both commissions.

William Rathbone and *Robert Benson* attended before the commissioners, under *George Browne* and *Henry Brownes'* commission, to prove the said sum of £1306. 2. 3. as a debt due to them from the said *George Browne* and *Henry Browne*, and they exhibited the said bill as a security for their debt. But the bill being payable to *William Rathbone* and *Robert Benson*, and not indorsed by *George Browne* and *Henry Browne*, the commissioners objected to admit the proof, unless they would consent to account to the assignees of *George Browne* and *Henry Browne*, for the dividends already received by them from the estate and effects of the drawers and acceptors of the bill, and to assign over all future dividends to be received in respect of the said bill.

Upon the proof being refused, *William Rathbone* and *Robert Benson* entered a claim for £1306. 2. 3. upon the proceedings; and the assignees of *George Browne* and *Henry Browne* retained in their hands a sum sufficient to pay a rateable dividend on the said debt of £1306. 2. 3. with the other creditors who had proved debts under the commission.

William *Rathbone* and Thomas *Benson* presented a petition, praying that his Lordship would be pleased to order that they should be at liberty to prove their said debt of £1306. 2. 3. under the commission against George *Browne* and Henry *Browne*, without delivering up the said bill, or making over the dividends received or to be received thereon, to the assignees; and that they might receive a dividend under the commission upon such sum of money, as they should not be satisfied out of the estates of the drawers and acceptors of the bill.

1818.
Ex parte
RATHBONE.
—In the
Matter of
BROWNE.

This petition being heard before Lord *Loughborough*, he was pleased to dismiss it.

The present petition was presented by the personal representatives of *Rathbone*, who survived *Benson*, stating the former petition, and that the claim still remained upon the proceedings; and that a sum of money had been set apart to answer the claim, upon which interest had been made; and it prayed that the former one might be reheard, and to have such relief as was thereby prayed; and to have the dividends paid, with such interest as had been paid or allowed by the bankers, in whose hands the same was set apart.

After the petition was opened, his Honor said he should wish to hear what the other side had to say in opposition to it.

Mr. *Cooke* and Mr. *Horne* for the assignees.

The only question is, whether an order to give a bill upon London in discharge of a debt, and the party to whom the order is given receives and returns the bill, is not as much a payment as if the order had been to pay in money, and the money had been paid. We may admit,

1818. ^{Ex parte} **RATHBONE**. — In the **Matter of BROWNE**. that if a person give another a bill for payment of an antecedent debt, and the bill is not honored, it is no payment; but that is the law only in cases where the bill has been treated by the party taking it as a nullity. Lord *Kenyon*, C. J. says in cases of this kind, if the bill which is given in payment do not turn out to be productive, it is not that which it purports to be, and which the party receiving it expects it to be, and therefore he may consider it as a nullity, and act as if no such bill had been given at all (a) If in this case the bill had been treated as a nullity, then it would not have been a payment. But the party by retaining it, and by using it for all the beneficial purposes of which it was capable, must be taken to have considered it as a payment. If it were not so consequences very serious to the trading part of the community would follow. The *Brownes* draw upon *Caldwell* and Co. with whom they have a running account. *Caldwell* and Co. in settling their accounts with the *Brownes'* estate claim to set off the bill given to *Rathbone* and *Benson*. Now, if *Rathbone* and *Benson*, in their account with the *Brownes* are also to set off the bill, the estate will be twice charged. In the judgment in *ex parte Blackburne*, (b) Lord *Eldon* does not advert to that view of the case. The effect of *Rathbone* and *Benson's* keeping the bill was to enable *Caldwell* and Co. to set it off against the *Brownes'* estate. *Rathbone* and *Benson's* contract with the *Brownes* was to be paid in a particular manner. When the bill was dishonored they might have elected to rescind the contract altogether. They did not choose to do that. They have resorted to the remedies which the substituted mode of payment afforded them, and they cannot now be allowed to turn round and say, we will

(a) *Puckford v. Maxwell*, 6 T. R. 52. (b) 10 Ves. 204.

rove for goods sold and delivered. From what fell
 om your Honor yesterday, the bill, so far as it relates
Caldwell and Co. and *Burton, Forbes* and *Gregory*,
 ust be considered as paid. If *Rathbone* and *Benson*
 their contract with the *Brownes*, had intended to
 serve to themselves a double security, they would
 ive required the bill to have been endorsed by the
Brownes. That not being the case, shews that the bill
 as to be considered as a payment, and not as a security.

1818.
Ex parte
 RATHBONE.
 —In the
 Matter of
 BROWNE.

The VICE CHANCELLOR.

In this case, *Rathbone* and *Benson* sell goods to
 eorge and Henry *Browne*, for which they give
 order upon their bankers, *Caldwell* and Co. of
 iverpool, for a bill for the amount, at three months
 ter date. *Caldwell* and Co. accordingly give *Rath-*
bone and *Benson* a bill at three months upon *Burton*,
orbes and *Gregory*, of London, which is accepted.
 he bill is dishonored, and both the drawers and ac-
 ptors become bankrupts. The question is, whether
Rathbone and *Benson*, having proved the bill under
 oth these commissions, can also prove under that of the
Brownes. If this question had originally come before
 e, I should have obtained the opinion of a court of law
 pon the question. I shall not do so now, as I en-
 rely concur with Lord *Eldon's* judgment in the case
 ited. Lord *Rosslyn* took a view of the subject, which
 as entirely new. He admits the bill to have been a se-
 urity; but then his principle is, you must either give
 your security or abandon your debt. This is con-
 rary to analogy and practice; and such an opinion
 oes not appear to have been entertained by Lord
Rosslyn in any other case.

1818.

Ex parte

RATHBONE.

—In the
Matter of
BROWNE.

Ordered as prayed, including the interest of the money set apart to answer the claims.

There were three other petitions in the same bankruptcy, raising the same question, in which similar orders were made.

Mr. *Bell*, Mr. *Montagu*, and Mr. *Bickersteth*, for the petitioners.

Mr. *Cooke*, and Mr. *Horne*, for the assignees.

14 March,
1818.

Ex parte BILLIALD.—In the Matter of BILLIALD.

When a bankrupt is in a situation to try the validity of his commission at law, the court will leave him to his action, putting him upon terms as to the time of the trial.

THIS was a petition by the bankrupt to supersede his commission.

Mr. *Montagu* for the petition.

Mr. *Rose* opposed it.

The VICE CHANCELLOR.

If a bankrupt brings an action at law, to supersede his commission, and fails, he pays costs, like any other plaintiff; but if he comes here for the same purpose, and fails even in cases where issues are directed, he escapes the payment of costs altogether. The consequence of this exemption from costs has been, that such petitions have multiplied, to the great oppression of creditors, and the waste of bankrupts' estates, for the costs of the successful defence against such petitions must fall upon the estate. The validity of the commission is a proper ques-

Petition to be tried at law, and I shall not act upon a petition to supersede a commission, in which the facts are disputed before a trial at law, unless, in special cases, where directions may be necessary to assist the trial. Let the petition stand over, with liberty to the petitioner to bring his action at law.

1818.
Ex parte
BILLIALD.
—In the
Matter of
BILLIALD.

Mr. Rose suggested that as the bankrupt might have brought his action in the first instance, that his Honor would dismiss a petition which was altogether needless, or that he would put the petitioner upon terms as to the time of bringing the action.

The VICE CHANCELLOR.

If I were to dismiss the petition, and the petitioner afterwards succeeded at law, another petition to supersede would be necessary, and I should occasion to those who oppose the petition a further expense, because I cannot give costs against a bankrupt. I will, however, limit the time to which the petition will stand over to the day of petitions before Michaelmas term, and if the action be not tried before that time, the petition shall then be dismissed.

Ex parte **PRICE.**—In the Matter of **Palmer.**

14 March,
1818.

ON the 22nd day of *April*, 1811, the bankrupt contracted with the petitioner to pay and secure to him an annuity of £40, during the life of the bankrupt at the price of £400, which sum the petitioner duly paid, and thereupon the bankrupt executed a bond, bearing date the 22nd. day of *April*, 1811, whereby he became

An annuity being duly registered according to the Statute 17 Geo. 3. c. 26. held, it was not necessary that an equitable mortgage taken as a further security

at a subsequent period should be registered.

1818.

Ex parte
PRICE.
---In the
Matter of
PALMER.

bound to the petitioner in the sum of £800, subject to a condition for making void the same on payment by the bankrupt, his executors, administrators or assigns, to the petitioner, his executors, administrators, or assigns of an annuity of £40, during the life of the bankrupt, to be paid by equal half yearly payments on the 22nd day of *October* and the 22nd day of *April*, in every year. For better securing the annuity, the bankrupt also executed a warrant of attorney, bearing date the 22nd day of *April*, 1811, to confess judgment in an action upon the bond for the sum of £800. A memorial of the bond and warrant was duly enrolled in the court of Chancery, on the 26th of *April*, 1811, pursuant to the statute (a).

The petitioner being dissatisfied with the security, in the month of *April*, 1813, applied to the bankrupt for some further security for the annuity, whereupon the bankrupt agreed to deposit in the hands of the petitioner an indenture of lease as a further security. Accordingly in the said month of *April*, 1813, he deposited with the petitioner a certain indenture of lease of premises in Hollis Street.

It was agreed between the petitioner and the bankrupt, that the lease and premises should be a security for the future punctual payment of the annuity. No assignment in writing of the said leasehold premises was made by the bankrupt.

On the 30th day of *March*, 1816, the commission issued.

The annuity had been paid to the petitioner up to the 22nd day of Oct. 1815, but since that time it was in arrear.

1818.
Ex parte
PRICE.
—In the
Matter of
PALMER.

The petition prayed that it might be referred to the commissioners to value the annuity, and to take an account of the arrears thereof, and that the leasehold premises might be sold by the commissioners, and that the money arising from the sale might be paid to the petitioner in satisfaction of so much of the arrears, and of the value of the annuity, as the same after payment of the costs, charges and expences of the petitioner and of the assignees, occasioned by the sale would extend to satisfy. And that the petitioner might be at liberty to prove the remainder of the value of the annuity under the commission.

Mr. Heald for the petition admitted, that if the deposit had been part of the original agreement, it ought to have been registered; but that the abuses against which the statute was intended to provide a remedy did not exist in the case of a subsequent contract. (a) The intention was, that the whole contract should in substance be registered. This had been done and the provisions of the statute were satisfied, and if the party afterwards thought fit to give a further security, it was a case not contemplated by those who framed the statute, and one to which the enactments did not apply.

Mr. Treslove for the assignees.

The doctrine of equitable deposit has never been extended to the cases of annuities. It is both contrary to the provisions of the statute of frauds and the annuity act.

(a) 17 Geo. 3. c. 26. repealed 53 Geo. 3. c. 141.

1818.
 {
Ex parte The decision in *Russell v. Russell* (a) has in all the cases
PRICE. from that time been lamented, and the court has uniformly
 ---In the expressed a determination not to extend the doctrine.
Matter of In *Norris v. Wilkinson* (b), the Master of the Rolls
PALMER. takes a distinction between a deposit made at the time
 the money is advanced, and one taken subsequent to
 the advancement. He says the connection is not so
 direct between a debt antecedently due and a subse-
 quent deposit, nor is the inference so plain.

But if your Honor should think that this case falls within the decisions of the cases on equitable deposits, I then submit that it is against the annuity act. The intention of the legislature was to guard against the secrecy by which such transactions were conducted, and it therefore directs that a memorial of the securities shall be enrolled in Chancery. But what can be more secret than the mere deposit of a deed? Besides, what is to be done? In the case where the deposit is to secure the payment of a sum certain, the contract points out what is to be done. If in this case it was referred to the master, What is he to do? Is he to direct a lease to be executed with powers of distress, &c.? There is no contract that can be executed. In *Taylor v. Kinloch* (c), Lord Ellenborough held that the deposit of documents of a ship at sea, would not give an equitable lien. In *Ex parte Wright* (d), the Lord Chancellor had very great doubt, even in the case of fraud, whether he could put the statute out of the question, and he thought the grantee of an annuity could not be considered as a mortgagee.

(a) 1 Brown C. C. 269. (c) 1 Starkie, N. P. Rep. 175.
 (b) 12 Ves. 192. (d) 1 Rose, B. C. 308.

The VICE CHANCELLOR.

1818.

This being the case of a mere deposit, it is not affected by the statute of frauds, nor is it within the provisions of the annuity act. It is not the grant of an annuity, but a mere engagement without deed, to give parties security for an annuity long before granted.

Ex parte
PRICE.
—In the
Matter of
PALMER.

Take the order as prayed.



Ex parte DODSON.—In the Matter of **GREENWOOD.**

EASTER TERM.

IN this case the bankrupt's certificate had been signed by creditors sufficient in number and value, and allowed by the commissioners, and was waiting for the confirmation of the Lord Chancellor. The petitioners were partners and holders of a bill of exchange accepted by the bankrupt. They had not proved any debt under the commission, and were proceeding at law against the bankrupt in an action to recover the amount of the bill of exchange. The petitioners stated they had lately discovered that certain signatures of the creditors to the certificate had been improperly obtained under a promise from the bankrupt to pay money (a) to the creditors so signing, and that

The court will not stay a certificate upon the petition of a creditor who has not come in under the commission, and who has the means of trying the validity of the certificate at law.

(a) By the 5 Geo. 2. c. 30. "case any such bankrupt s. 7. it is enacted " And in "shall afterwards be arrest-

1819.

Ex parte
Dodson.
 —In the
 Matter of
 GREENWOOD.

the bankrupt had actually given to one of his creditors £20 for that purpose, and therefore prayed that the certificate might not be confirmed.

“ed, prosecuted, or implead-
 “ed for any debt due before
 “such time, as he, she, or
 “they became bankrupt.
 “such bankrupt shall be dis-
 “charged upon common
 “bail, and shall and may
 “plead in general, that the
 “cause of such action or suit
 “did accrue before such time
 “as he, she, or they became
 “bankrupts, and may give
 “this act and the special
 “matter in evidence; and
 “the certificate of such ban-
 “krupt’s conforming, and
 “the allowance thereof, ac-
 “cording to the directions of
 “this act, shall be, and shall
 “be allowed to be sufficient
 “evidence of the trading,
 “bankruptcy, commission,
 “and other proceedings pre-
 “cedent to the obtaining
 “such certificate, and a ver-
 “dict shall thereupon pass
 “for the defendant, unless
 “the plaintiff in such action
 “can prove the said certifi-
 “cate was obtained unfairly
 “and by fraud, or unless
 “the plaintiff in such action
 “can make appear any con-
 “cealment by such ban-
 “krupt to the value of ten
 “pounds; and if a verdict
 “pass for the defendant, or
 “the plaintiff shall become
 “non-suited, or judgment
 “be given against the plain-
 “tiff, the defendant shall re-
 “cover his full costs.”

Under this section it has been held, If a bankrupt’s creditors are induced by money to sign his certificate it is void, though the bankrupt do not know it when he makes the necessary affidavit. *Robson v. Calze. Doug.* 228, and also see *Ex parte Butt*, 10 Ves. 359, or even if he remain ignorant till after the certificate is allowed. *Holland v. Palmer.* 1 Bos. and Pull. 95. In this last case the signature of the creditor so induced to sign was material to the certificate, 15 East, 251. But where the fourth amongst several other signatures of creditors to the certificate was obtained by the promise of the bankrupt to pay that creditor his whole debt, the certificate was held to be void, although the creditors who signed before and after the fourth were sufficient in number and value without reckoning that one; for his example might have induced others to sign it. *Philips v. Dicus.* 15 East, 243.

An agreement to pay the sum of money to the assignees for the benefit of all the creditors, has been held to be within the letter and reason of the statute. *Jones v. Barkley*, Doug. 684, 695. (u. 3.)

Lord Mansfield was of opi-

When this petition came on to be heard the Vice Chancellor was of opinion that as it presented a case where the petitioners had a clear legal remedy he could not entertain it, but he said that he would mention the matter to the Lord Chancellor in order that some general rule might be adopted in such cases. His Honor this day said he had conferred with the Lord Chancellor on the subject, and they were agreed, that where the petition is presented by a creditor who has not come in under the commission, and where he has the means of trying the validity of the certificate before a jury, the court will not stay the certificate.

1818.
Ex parte
DODSON
—In the
Matter of
GREENWOOD

Mr. Roupell for the petition.

Mr. Montagu opposed it.



Ex parte JANSON.—In the Matter of CORF. LINC. INN.
19 May,
1818.

ON the 11th of May, 1811, a commission issued against Corf, under which he was declared a bankrupt. Corf had carried on a trade in co-partnership with James Dwerryhouse distinctly from his separate trade. This partnership was dissolved in the year 1807, when by an indenture bearing date the 1st. August, 1807, Dwerryhouse assigned to Corf the partnership stock

Where a commission of bankruptcy had issued against one of two partners and the other partner was insolvent, but no commission had issued against him. Held that the joint creditors could not come in competition with the separate creditors and that receive a dividend out of the separate estate of the bankrupt.

nion that if an enemy of the bankrupt were to give money to induce a creditor to sign, that would be a fraud on the bankrupt, and should not hurt him. Doug 229. And where money has been given to a creditor to sign the

certificate, unknown to the bankrupt, the Lord Chancellor has cancelled it, that the bankrupt might have the opportunity of procuring a new one. Ex parte Harri- son, 4 Mon. B. L. App. 36.

1818.
Ex parte
JANSON
 —In the
 Matter of
CORF.

in trade, debts and effects, in trust to apply the same in payment and discharge of the debts and engagements of the joint trade, and if any surplus should remain, to retain a moiety thereof, and to pay the other moiety to *Dwerryhouse*. Under this deed *Corf* possessed himself of the joint stock and effects, as far as he was able, and thereby and by other means paid many of the debts of the joint concern to a greater amount than the value of the joint property which he had received. When the commission issued against *Corf* all the joint estate and effects had been applied in payment of the debts. *Dwerryhouse* was admitted to be insolvent, but no commission had issued against him. The petitioner and other joint creditors had proved their debts under the commission, but the commissioners refused to make an order of dividend of the separate estate in their favor. This petition was presented by the petitioner on behalf of himself and the other unsatisfied creditors of *Corf* and *Dwerryhouse*, praying that the commissioners might be directed to order a dividend of the remaining estate and effects of the bankrupt, to be made amongst the joint creditors of the bankrupt and *Dwerryhouse*, equally with the separate creditors of the bankrupt.

The Solicitor General for the petition.

Mr. *Cullen* opposed the petition, upon the principle determined in *ex parte Kensington (a)* in which case there was no joint property, but there was a solvent partner. And he contended, although here the partner was said to be insolvent, and

(a) 1 Vcs. 447.

unable to pay all his creditors, yet that did not constitute a legal insolvency, which the court would recognize.

1818.

Ex parte
JANSON
—In the
Matter of
CORP.

The VICE CHANCELLOR.

Joint creditors cannot come in competition with separate creditors upon the separate estate if there be any other fund to which they can resort. Where all the partners are bankrupts, and there is no joint fund then the court will send them to the separate estate to be paid equally with the separate creditors. Here the difficulty is, the partner is not declared a bankrupt, and although he may be insolvent, that is he may not have enough to pay all his debts, yet he may have sufficient to pay this petitioner 20s. in the pound, provided he use due diligence by bringing his action. It is a question of some nicety, and I will speak with the Lord Chancellor on the subject before I decide it.

25th May.

The VICE CHANCELLOR.

I have conversed with the Lord Chancellor respecting this petition, and he concurs in the view I took of the case. We agree in thinking that so long as there is another fund to which the joint creditors can resort, they cannot receive a dividend with the separate creditors, and that in the present case the inability of the debtor to pay all his debts does not take it out of the general rule, because it does not follow that a diligent creditor may not get the whole of his debt paid.

LINC. INN. Ex parte PRICE.—In the Matter of LANE.

19 May,

1818.

If it appear by the petition of a creditor to supersede a commission that an action is commenced to try its validity the court will not supersede the commission till the event of the trial is known.

THIS was a petition by a judgment creditor of the bankrupt to supersede the commission on the ground that it was concerted. It was stated in the petition that the assignees had commenced an action against the sheriff for the goods taken in execution upon the petitioner's judgment. There were not any affidavits made in answer to those for the petition. No one appearing to oppose the petition an affidavit of service was produced, upon which Mr. *Montagu* contended that the commission ought to be superseded.

The VICE CHANCELLOR thought as the petition stated a case by which it appeared that the validity of the commission was in a course of being tried in a court of law, all that he could do would be to retain the petition till the event of the trial was known.



LINC. INN. Ex parte MILLS.—In the Matter of COLES.

19 May.

1818.

Petition allowed to stand over to amend the title.

THIS petition by joint assignees to supersede the separate commission of one of the bankrupts was entitled in the joint commission only.

The Solicitor General and Mr. *Cullen* admitted that no order could be made under the separate commission upon a petition so entitled; but they suggested that the court would allow the petition to be amended by entitling it as of the separate commission only. The Vice Chancellor being of that opinion, the petition stood over with liberty to amend the title.

Sir Samuel Romilly and Mr. Heald for the assignees of the separate commission.

1818.
Ex parte
MILLS.
—In the
Matter of
COLES.



Ex parte THORLEY.—In the Matter of ROBERTS. TRIN TERM
1818.

A QUESTION was made upon this petition by an assignee for his removal, upon what terms he should be permitted to retire.

An assignee who retires must give security to be approved of by the master to protect the estate against any costs that may arise in any action at law or suit in equity occasioned by his retiring. He must also permit the new assignee to use his name in the actions at law.

The VICE CHANCELLOR.

He must indemnify the estate against the consequences of his withdrawing from the trust, and I think the better way will be for him to give security to be approved of by the master, to protect the estate against any cost that may arise in any action at law, or suit in equity in consequence of his retiring. He must also permit the new assignee to use his name in the actions at law.

Mr. Montagu suggested that the reference should be to the commissioners instead of to the master, as being less expensive.

The VICE CHANCELLOR.

The Commissioners cannot take a security.

Mr. Rose appeared for one of the creditors.

TRIN TERM 1818. Ex parte WILTSHIRE.—In the Matter of TURN-
BULL.

Petition not to stand over for the purpose of replying to affidavits unless the application be made at least two days before the petition appears in the paper. **MR. MADDOCK** requested that this petition might stand over to give the petitioners an opportunity of replying to affidavits that were only filed on Saturday, the petition being in the paper for the Tuesday following.

The VICE CHANCELLOR said, that for the future he would not entertain any application to postpone the hearing of a petition, in order to give the applicants an opportunity of replying to affidavits, unless the application were made at least two days before the petition appeared in the paper.

Mr. *Ross* for the respondents.

TRIN TERM 1818. Ex parte EDWARDS.—In the Matter of ED-
WARDS.

Assignees made to pay the costs of a trial upon an issue directed to try the validity of the commission they being the plaintiffs and the bankrupt the defendant, but they were not made to pay the costs of the petition to supersede the commission. **UPON** the petition to supersede this commission by the bankrupt, two issues had been directed. First whether the said *George Edwards* was a bankrupt at the date and suing forth of the commission. Secondly

whether there was a good and valid debt due to the petitioning creditor, at the date and suing forth of the commission, in which issues the assignees were to be the plaintiffs, and the bankrupt the defendant. At the trial the verdict was for the bankrupt.

1818.
Ex parte
EDWARDS.
 —In the
 Matter of
EDWARDS.

Upon the question of costs,

The VICECHANCELLOR thought that as the assignees would have had to pay the costs of an action, brought against them by the bankrupt, in which he had succeeded so by analogy to the rule of law, where the court directed an issue, and the assignees took upon themselves to be plaintiffs, they must pay the costs of trial in the event of the judgment being against them. But his Honor would not give the bankrupt the costs of the petition to supersede the commission against the assignees, stating that it was their duty as trustees for the creditors, to appear and resist the prayer of the petition.

Mr. *Hart*, Mr. *Cullen*, Sir Arthur *Piggott*, Sir Samuel *Romilly* and Mr. *Montagu* appeared for the several parties interested under the petition.



Ex parte **BURGESS.**—In the Matter of **BURGESS.** **TRINITY TERM**
 1818.

THIS was a petition by the bankrupt to supersede his commission on the ground, that the petitioning creditor was a party to a deed of composition, the execution of which was the act of bankruptcy.

Mr. *Montagu* for the petition.

On the petition of the bankrupt the commission superseded, the act on which the adjudication was made being invalid, and there not being an affidavit of any other act.
 Succeeds if there had been such an affidavit.

1818.
Ex parte
 BURGESS.
 —In the
 Matter of
 BURGESS.

Mr. *Wilson* on the other side stated he was instructed to say there were other acts that would support the commission.

The VICE CHANCELLOR.

If there were an affidavit to that effect I would not supersede the commission, until the bankrupt had succeeded at law; for upon a trial at law the commission might be supported by the evidence of other acts of bankruptcy, but as you have no affidavit there is no question raised which makes a trial at law useful.

Commission superseded.

TRIN TERM 1818. *Ex parte* DISTER.—In the Matter of TOMPSON.

In directing an issue, the court will not order the examination of persons at the trial, who by the rules of the court of law could not be examined without such order, except sometimes in cases where the facts in dispute rest only on the knowledge of the plaintiff and defendant. **A**N issue being directed in this case, the Vice Chancellor, upon being pressed to direct parties to be examined at the trial, declared, that in directing an issue he would never order the examination of persons at the trial who could not by the rules of the courts of law be examined. That it was not for him to say that those rules tended to injustice or to apply the remedy. That where a disputed fact rested in the knowledge of the plaintiff and defendant, only courts of equity had sometimes directed both parties to be examined in an issue, but the exception to the rule of law had not gone beyond the principle of those cases.

Mr. *Hart*, Mr. *G. Wilson* and Mr. *Montagu* appeared on this petition.

Ex parte PADDY.—In the Matter of DRAKELY. TRIN. TERM. 1818.

IN this case the petitioning creditor's debt was due to him in his character of executor. When the docket was struck, the petitioning creditor had not proved the will, but he obtained the probate before the commissioners had made their adjudication.

An executor who sues out a commission and afterwards, but before the adjudication of the commissioners obtains probate of the will, is a good petitioning creditor.

Mr. *Heald* insisted under these circumstances, that there was not a sufficient debt to support the commission.

Mr. *Hart*, and Mr. *Roots* on the other side, relied upon the case of *Rogers v. James* (a).

The VICE CHANCELLOR was of opinion, that the principle of the decision of the court of Common Pleas in *Rogers v. James*, applied to the present case, and he therefore overruled the objection taken to the validity of the commission.

(a) 2 *Marsh.* 425.



Ex parte WHITTINGTON. { In the Matter of TRIN. TERM
Ex parte SMITH. { WHITTINGTON. 1818.

WHITTINGTON the bankrupt presented a petition to supersede his commission, and died before the last meeting of the commissioners, without having surrendered himself. The petition is revived by his personal representative. The commission ordered to be superseded.

A bankrupt presents a petition to supersede his

1818. the last meeting without having surrendered himself to
 the commissioners. After his death his personal re-
Ex parte presentative revived the petition.
 WHITTINGTON

Ex parte
 SMITH.

—In the Sir Samuel Romilly and Mr. Phillimore for the pe-
 Matter of tioning creditor, contended that as the bankrupt had
 WHITTINGTON not surrendered, the court would not supersede the
 commission. *Ex parte Jones (a)*.

Mr. Montagu for the petition in answer to the ob-
 jection, replied, That the question was whether in the
 case of a petition presented by a bankrupt before the
 last meeting of the commissioners, but before he
 had surrendered, could be made good by a subsequent
 surrender. This he said had been determined in
Ex parte Jones and many other cases, where the
 court had retained the petition till the bankrupt had
 an opportunity to surrender, and he contended where
 the power of surrendering had been prevented by the
 act of God, the court would make the same order as
 though he had actually surrendered; and of this
 opinion was his Honor the Vice Chancellor.

The commission ordered to be superseded.

Ex parte GREENWOOD.—In the Matter of **LANC. INN. WHATELY.**—In the Matter of **FREEMAN and Co.** 12 March, 1818.

WHATELY the Bankrupt, in March 1810 carried on business on his separate account as a merchant, and also as a leather seller, in partnership with one Joshua Greaves, under the firm of Joshua Greaves and Co. In March 1810, Ottley and Brown drew a bill of exchange on Whately for £1296 : 17 : 6 payable six months after date, which he accepted, Whately being indebted in £1000 to the firm of Joshua Greaves and Co. in which he was a partner, handed over the bill of exchange to the firm, and received the difference, £296 : 17 : 6; the firm of Joshua Greaves and Co. having a general account with Freeman and Co. paid the bill of exchange to them, at which time the cash balance was in favor of the firm of Joshua Greaves and Co. to the amount of £6,000 or thereabouts. Freeman and Co. were then under acceptances for the firm of Joshua Greaves and Co. to the amount of £12,000 which acceptances had been discounted or paid away by that firm for their own benefit. The firm of Joshua Greaves and Co. did not endorse the said bill of exchange when they delivered it to Freeman and Co. who afterwards endorsed it, and procured it to be discounted by Messrs. Down, Thornton and Co. who were the holders when it became due.

W carrying on a separate trade is also in partnership with G. under the firm of G. and Co. W. in his separate character being indebted to G. and Co. gives that firm a bill of exchange, drawn by G. and Co. and accepted by him. G. and Co. being largely indebted on a drawing account to F. and Co. pay the bill to them who endorse it to D and Co. D and Co. compound with their creditors. W. G. and Co. and F. and Co. become bankrupts. D. and Co. by the composition and by proving under the commission of W. and F. and Co. receive 20s. in the pound upon the bill. Held that although G. and Co. were only indebted to F. and Co. in respect of their acceptances, and which F. and Co. had not taken up when they became bankrupts, yet that the assignees of F. and Co. were entitled to stand in the place of D. and Co. in respect of the proof made by them under W's commission to the extent of the dividends paid to D. and Co. under F. and Co's commission.

1818.

Ex parte
GREENWOOD
—In the
Matter of
WHATELY.
—In the
Matter of
FREEMAN
and Co.

When the bill became due it was dishonored, and subsequently commissions of bankrupt issued against *Whately* and against *Joshua Greaves* and Co. and also against *Freeman* and Co. *Down* and Co. proved the bill under *Whately's* and *Freeman* and Co.'s. commissions; also received a composition of seven shillings in the pound from *Ottley* and *Brown*, by which, and the dividends paid under the commissions, they received twenty shillings in the pound. *Freeman* and Co. had not at the time of their bankruptcy taken up their acceptances, and the bills accepted by them and discounted or paid away by the firm of *Greaves* and Co. were proved under *Greaves* and Co.'s commission, and also under the commission against *Freeman* and Co.

The assignees of *Freeman* and Co. presented this petition to stand in the place of *Down* and Co. and to have the benefit of the proof made by them upon the bill against the estate of *Whately*, to the extent of the dividends, which the estate of *Freeman* and Co. had paid upon the bill.

Sir Samuel Romilly and Mr. Pemberton insisted that *Freeman* and Co. having given a *bona fide* consideration for the bill, their assignees were entitled to stand in the place of *Down* and Co. in respect of the proof they had made under *Whately's* commission.

Mr. Cooke and Mr. Perkins conceded, that, *Freeman* and Co. had paid the value of the bill to *Joshua Greaves* and Co. they would be entitled to stand in the place of *Down* and Co.; but they contended, that, as *Joshua Greaves* and Co. had given this bill, together with several others to *Freeman* and Co. in return for which *Freeman* and Co. only gave their acceptances, all of which had been proved under *Joshua*

Greaves and Co's. commission ; a valuable consideration had not been given for the bill. That in taking an account between bankrupts estates, outstanding acceptances are never taken into consideration, and that, the acceptances not having being taken up before the bankruptcy of *Freeman* and Co., no consideration passed between the parties.

1818.
Ex parte
GREENWOOD.
—In the
Matter of
WHATELY.
—In the
Matter of
FREEMAN
and Co.

The VICE CHANCELLOR.

There is no doubt if *Freeman* and Co. had actually paid in money to *Joshua Greaves* and Co. the amount of the bill, that their assignees might stand in the place of *Down* and Co. My opinion is, that, if, by giving an acceptance a debt be constituted which may be proved under a commission, that is as much a consideration as if the value of the bill had actually been paid in money.

Ordered according to the prayer of the petition.



Ex parte REID.—In the Matter of RITCHIE. (a) LINC. INN.
19th. March
1818.

IN August 1800 Messrs. *Walter Ritchie* and Sons, and Messrs. *Alexander* and Co. having contracted joint debts, and being unable to pay their creditors in full, proposed a composition of 6s in the pound by four instalments, payable at 6, 12, 16, and 20 months, with security for the last instalment. To this proposal the creditors acceded.

A. guaran-
tees B. and
Co. against
any loss they
may happen to
suffer on ac-
count of the
non-payment,
of an instal-
ment by cer-
tain joint
debtors of B.
and Co.
one of the joint
debtors becom-

ing bankrupt, B. and Co. under an order for the proof of joint debts under his separate commission prove the amount of the instalment, and receive a dividend. Ordered that the benefit of the future dividends on the proof be sold, and the produce paid to B. and Co. and that the monies so received by them, together with the amount of the former dividend, be deducted from the instalment, and that B. and Co. might prove for the difference under A's commission.

(a) *Ex relatione.*

1816.
 {
Ex parte. Bills were accordingly given to the creditors, falling
 due at the dates of the respective instalments.
 REID.

—In the
 Matter of
 RITCHIE. In order to secure the last instalment, Walter *Ritchie* and Co. and *Alexander* and Co. applied to the petitioners, and the petitioners agreed to give them acceptances to the creditors to the extent of £3000 which they accordingly did, and to indemnify the petitioners for so accepting the bills, John *Ritchie*, who was not a partner in the firm of Walter *Ritchie* and Co. gave the petitioners the following guarantee in the form of a letter, that is to say, “Messrs. *Reid, Irving* and Co. Gentlemen, as Messrs. Walter *Ritchie* and Sons, and Thomas *Alexander* and Co. are about settling with their creditors by composition, payable by instalments, in 6, 12, 16, and 20 months, giving a security for the regular payments of the last instalment, and as you have agreed to be their security by accepting their drafts in favor of creditors, to the extent of £3000 thereof, I hereby engage myself to be guarantee to you against any loss you may happen to suffer on that account. Dated, London, the Nov. 1814, and signed John *Ritchie*.”

On the 6th *July*, 1816, after all the instalments had expired, a commission of bankrupt was issued against Walter *Ritchie*, and on the 24th *August*, 1816, another commission of bankrupt issued against John *Ritchie* the guarantee.

There was due to the petitioners on the 6th *July*, 1816, £2,729 : 1 ; in respect of the payments they had made on their acceptances for the last instalment.

The petitioners proved the debt of £2,729 : 1, under the commission against *Walter Ritchie*, upon an order for proof of joint debts, under his separate commission. By virtue of such proof they had received a dividend of 4s. in the pound.

1818.
Ex parte.
REID.
 —In the
 Matter of
RITCHIE.

The petitioners applied to prove the £2,729 : 1 in this commission against the separate estate of *John Ritchie* under the letter of guarantee, which the commissioners refused, and the petition prayed, that the petitioners should be permitted to prove the whole sum. But it was admitted on the part of the petitioners, that the dividend actually received from the estate of *Walter Ritchie*, must be deducted, and that the proof must be only for what remains due of the £2,729 . 1. Sir *Samuel Romilly* for the respondents, insisted, that the terms of the guarantee, were only to make good any loss that might happen, and the extent of the loss could not be known, until a final dividend under the estates of the original debtors, so that either no proof ought to be admitted, or if any proof should be admitted, the petitioners should give to *John Ritchie's* estate the benefit of future dividends, under the commission against *Walter Ritchie*.

To this it was answered, that an action would lie against *John Ritchie* at the time of the commission, and therefore the debt was proveable.

The Vice Chancellor ordered, that the benefit of the future dividends, on the proof made by the petitioner under *Walter Ritchie's* commission should be sold, and the produce paid to the petitioners, and that the monies so received, together with the amount of the former dividend should be deducted from the £2,729 . 1 and

1818.
 —
Ex parte
 REID.
 —In the
 Matter of
 RITCHIE.

that the petitioner should be permitted to prove difference against the estate of John *Ritchie*, receive dividends on such proofs.

Mr. *Cooke* and Mr. *Heald* for the petition.

Sir Samuel *Romilly* for the respondents.

LIN. INN,
 28 July,
 1818.

Ex parte COLES.—In the Matter of COL

An examination taken before the commissioners upon an inquiry is not evidence to expunge a creditors proof who was not party to the inquiry.

Nor is it evidence to ground an order for an inquiry as to the validity of the proof.

THIS was a petition by the bankrupt to set aside certain proofs on the ground of usury. The petitioner proposed to read the examination of a Mr. *K* taken before the commissioners.

It was objected on behalf of one of the respondents whose debt was sought to be expunged, that the examination could not be read as against him, he was not a party to or interested in the subject of the inquiry in which the examination was taken. In *ex parte Bell*, (a) the Lord Chancellor had determined that the examination of a bankrupt, taken under another commission, was not after his death evidence in his bankruptcy to expunge a debt. That his Lordship's judgment in that case did not turn upon the examination being taken under another commission, but because the creditor was not a party to it.

On the other side it was argued, that as the petitioner only proposed to make use of the examination as an affidavit, it was not a good objection, that the

(a) 2 Rose, B. C. 61.

or was not present when it was taken. When a person makes an affidavit as to any fact stated in a petition, the party sought to be charged by that evidence has not an opportunity of cross examining the deponent, but may meet the evidence by counter affidavits; so in this case the creditor might give evidence to disprove the examination just as though the matter of it had been embodied in an affidavit.

1818.
Ex parte
COLES.
—In the
Matter of
COLES.

The VICE CHANCELLOR.

I am of opinion this examination is not evidence, and cannot be read against any person who was not a party to it. I was engaged in the case that has been mentioned. We there contended that the examinations might be read, not as a judicial proceeding, but as an affidavit. But we were not suffered to use them for that purpose, on the ground, that, if the allegations contained in them were false, an indictment for perjury could not be sustained. Upon a petition to expunge the debt of A. B. could you read an affidavit made in another petition to expunge the debt of C. D.? Or if the deponent in that affidavit had stated matter that was false, as relating to the debt of A. B. could he be indicted for perjury upon such a deposition? He clearly could not. For to support an indictment for perjury, the false testimony must be material to the determination of the question raised in the petition, in which the affidavit is filed. And it is very easy to conceive that an untrue statement in an examination, may be quite immaterial with respect to the debt of the party to that examination, and yet very material as to the debt of another person not party to the examination.

The bankrupt had made an affidavit that he had heard and believed the statements of the petition to be true. It was then contended, that upon this evidence the

1818.
 —
Ex parte
 COLES.
 —In the
 Matter of
 COLES.

court would direct an inquiry ; especially as the bankrupt's affidavit was not contradicted.

The VICE CHANCELLOR.

I cannot make that order upon such an affidavit ; although the creditor has not contradicted it. The court will not order an inquiry upon an affidavit that merely states general hearsay information and belief, unless the case be pregnant with circumstances of suspicion. If the parties think fit I will let the petition stand over to give them the opportunity of applying to Mr. *Kinnear* to make an affidavit as to the truth of his examination. If he should refuse to do so then some person who is capable of deposing to the contents of *Kinnear's* examination may make an affidavit, which, supported by an affidavit that he had refused to give his testimony, would furnish grounds sufficient for an inquiry.

Mr. *Heald* and Mr. *Alcock* for the petition.

Mr. G. *Wilson* for the creditor.

LINC. INN. *Ex parte* SHAYLE.—In the Matter of SHAYLE
 29, July,
 1818.

Affidavits in reply are only to be permitted in cases where new matter is introduced in the affidavits answering the petition.

MR. *Blake* for the petition requested that it might stand over for the purpose of replying to affidavits that had been recently filed after the petition was filed.

Mr. *Montagu* opposed the application.

The VICE CHANCELLOR.

I shall let the petition stand over that you may file affidavits as to the new matter contained in the affidavits answering the petition. A petitioner cannot be permitted to file affidavits in reply except as to the new matter contained in those in answer to the petition.

1818.

Ex parte
SHAYLE.

—In the
Matter of
SHAYLE.

Ex parte

—In the Matter of SALISBURY.
LINC INN,
29th July,

THIS was a petition for permission to purchase the bankrupt's mortgaged estate. The petitioner was the mortgagee, and also the sole assignee. He was a creditor to a large amount. There was only one other creditor, and his debt was very small. The bankrupt was dead. The executor would not act, and there was not any one willing to administer.

A mortgagee who was the sole assignee and principal creditor, there being only one other creditor to a small amount, permitted to bid for the estate subject to the approbation of the master, the mortgagee undertaking to make good the deficiency between the sum bid and the price to be fixed by the master in case he should not approve of the bidding.

Mr. Bell and Mr. Pemberton for the petition.

The VICE CHANCELLOR.

I do not recollect any case where the estate of the bankrupt was so unprotected. The order I shall make will be to permit the mortgagee to bid for the mortgaged estate, and if he become the purchaser, then that it be referred to the master to inquire whether the price to be paid is sufficient, and if he be of opinion that it is insufficient, then to state the amount of the deficiency, which the petitioner must undertake to pay.

LINC. INN, *Ex parte* HARRISON.—In the Matter of HARRISON.
 31st July,
 1818.

The court will not at the petition of the bankrupt direct inquiries as to the management of the estate, if he have not a pecuniary interest therein

THIS petition presented by the bankrupt stated the bankruptcy of the two assignees who had been chosen, as was alledged, through the influence of the solicitor to the commission, under an understanding that he was to have the sole management of the estate. It charged the solicitor with divers acts of misconduct, and prayed that there might be a new choice of assignees, and that the solicitor might account for what he had received, and that an inquiry might be directed as to the charges against the solicitor contained in the petition.

Mr. *Horne* and Mr. *Teed* for the petition.

Mr. *Hart* and Mr. *Rose* on the other side contradicted, as the bankrupt did not pretend that he had any pecuniary interest he could not present such a petition.

The VICE CHANCELLOR.

The question is not whether a bankrupt who has no pecuniary interest may not present a petition complaining of improper conduct in his assignees. But if the estate is so circumstanced that the bankrupt cannot in any event have any pecuniary interest, and he is unsupported by any creditor, the court will not upon his petition institute enquiries into the conduct of the assignees or solicitor, because such enquiries may occasion considerable expence to the estate, and must be asked for by some person interested in the estate, and capable of paying costs.

ing admitted that the bankrupt had not any pe-
r interest the petition was dismissed.

1818.

Ex parte
HARRISON.
—In the
Matter of
HARRISON.



Re **BOYLE**.—In the Matter of **WARRING- LINC. INN.**
TON. 31st July,
1818.

S petition presented by the assignees, charged
e commission was issued by the petitioning cre-
n concert with the bankrupt and two other per-
f the name of *Bower* and *Prince*, who were
ion creditors, and it prayed that the commission
be superseded at the costs of the petitioning cre-
and of *Bower* and *Prince*, and that the petiti-
night be at liberty to take out a new commis-
ainst the bankrupt.

Affidavits
that merely
state hearsay
and benefit as
to a commis-
sion being
concerted, are
not alone suf-
ficient to in-
duce the court
to direct an
issue, but if
they are cor-
roborated by
circumstances
of suspicion
attending the
case, an issue
will be di-
rected.
The jurisdic-
tion in bank-
ruptcy ex-
tends to every
person frau-
dulently en-
gaged in issu-
ing a com-
mission.

Montagu for *Bower* and *Prince*, insisted they
strangers to the commission and could not be
it before the court upon petition.

Re **VICE CHANCELLOR.**

nceive in every case where a fraud in issuing a
ssion has been practised upon the great seal, all
s implicated in the fraud may be brought before
rt by petition.

1818.

Ex parte

BOYLE.

—In the
Matter of
WARRINGTON

The petitioner by his affidavit only deposed as
information and belief.

Mr. *Agar* and Mr. *Duckworth* for the assignee
contended that such an affidavit was not sufficient
to induce the court to direct an issue.

Mr. *Cullen* for the petition.

The VICE CHANCELLOR.

I had occasion to observe the other day that affidavits stating hearsay and belief, are sufficient to ground an enquiry, when the case is pregnant with circumstances of suspicion. I think this case is pregnant with circumstances of suspicion. (a)

An issue must be directed to try the concert.

(a) The bankrupt's father was the petitioning creditor. The solicitor to the commission was his brother-in-law. The bankrupt had been in embarrassed circumstances for six months previous to his bankruptcy. His father and brother-in-law, and *Bower* and *Prince*, during that time acquiesced with the embarrassed state of his affairs. The affidavits which had issued were stale warrants of attachment which had issued were witnessed by the bankrupt's brother-in-law.

vs STAFF.—In the Matter of **SAUNDERS.** LINC. INN.
1 August,
1818.

The prayer of this petition was to supersede the commission at the costs of the petitioning creditor and solicitor. The petition was presented by judgment creditors, and it stated that the commission was conferred, and that it issued at the instance and request of the bankrupt. The petitioners failed in proving the petition. As to the other part of the case the petitioner, by his affidavit, admitted that he went abroad about the beginning of November last for the purpose of attending to his business there as a carrier, and that whilst he was in his quarters at the George Inn, Aldermanbury, on or about the 1st of the same month of November, the bankrupt called on him and informed him that he was in considerable difficulties respecting his business, and that he expected Mr. Staff to levy an execution on his goods for a large debt, and requested the deponent to sue for a commission of bankruptcy against him, as he said that bankruptcy would be the only thing to prevent Mr. Staff's execution from taking effect, and of enabling him to get clear of his difficulties. The deponent objected to do so, but *Saunders* afterwards called on him the same evening, or in the morning of the next day, and informed him, that if he would strike the bankrupt, T. E. who *Saunders* said was his attorney, whom he had seen on the business, would manage the thing, and that the deponent would have no objection with it. *Saunders* further stated to the deponent that he had appointed for himself and him to

The court will not supersede a commission that is not otherwise concerted merely on the ground that it issued at the instance of the bankrupt.

1818. meet T. E. at the King's Head, Old Change, on the business. That the deponent soon afterwards went thither, where he found *Saunders*, and after a very short space of time had elapsed, T. E. also came in. That T. E. then informed the deponent of the meaning of striking a docket, and what was necessary to be done in consequence thereof; of the nature of which he was before totally ignorant; and after some further observations had passed, the deponent was persuaded by *Saunders* and T. E. to sign some papers for the purpose of suing out a commission of bankrupt against *Saunders*. That until *Saunders* called upon him the deponent had not the least idea of any commission of bankrupt being to be issued against *Saunders*, and that T. E. had never been employed by him in any business whatever, neither had he any particular acquaintance with him before the above mentioned day of their meeting together. And that the deponent being then unacquainted with the nature of the proceedings necessary for suing out a commission of bankrupt he had no conception that any degree of fraud was intended in suing out the commission against *Saunders* nor did he know of any previous concert of the business *Saunders* and T. E. or any other person or persons, but on the contrary he was from the observations then made by said *Joseph Saunders* and T. E. induced to believe that the issuing of the commission of bankrupt against *Saunders* would operate generally for the benefit of his creditors, and that by suing out such commission he would not incur any risk of expence or trouble in this business.

T. E. who was the bankrupt's solicitor, and who sued out the commission, also made an affidavit, stating, that *Saunders* on the 3rd or 4th day of November last, wishing to speak to him on the subject of his affairs appointed the deponent to meet him the follow-

g day at the King's Head, Old Change, at eleven o'clock, but gave no intimation that the petitioning creditor or any other person would meet him there; nor does he believe that at the time of such appointment being made *Saunders* had seen or knew of the petitioning creditor being in London; nor did the deponent know that he was in town, or likely or expected to be in town, That the deponent attended at the King's Head Coffee House, and after he had been in conversation with *Saunders* sometime the petitioning creditor came into the coffee house, and conferred with him as to striking a docket against *Saunders* with a view to have an equal division of his effects amongst his creditors, and not for the purpose of defrauding him, as untruly stated in the said petition. And the deponent denied that the petitioning creditor was persuaded by *Saunders* and the deponent to sign some paper for the purpose of suing out a commission of bankruptcy against *Saunders*, and he admitted that he had not previously been professionally concerned for the petitioning creditor, nor did he know that he had any professional adviser in London, but that he had for a considerable time known the petitioning creditor, and had dined with him and met him frequently at the George Inn, Aldermanbury, where the petitioning creditor puts up on his arrival in town, and he believed that in consequence thereof he was so employed by him, and that neither at that time, or at any other time, did he concert with the petitioning creditor, and *Saunders* any act of bankruptcy, nor did he know of the act of bankruptcy until after the same was committed, and that if there was any concerted act of bankruptcy between the petitioning creditor and the bankrupt he was not privy thereto.

1818.
Ex parte
STAFF
—In the
Matter of
SAUNDERS.

1818.
Ex parte
 STAFF
 —In the
 Matter of
 SAUNDERS.

The petitioners not being able to prove a concerted act of bankruptcy, his honor the Vice Chancellor said, it clearly appeared that the commission issued upon the suggestion and at the request of the bankrupt to whom the petitioning creditor lent himself, and he called upon the petitioners counsel to shew that the commission should for that reason be superseded.

The Solicitor General and Mr. *Collinson*, argued that a commission of bankrupt was a process the law gave to the creditors of traders and that where a commission was issued nominally by a creditor but in fact by the bankrupt it was a fraud upon the great seal. It had always been understood by the profession that bankrupt commissions would be superseded. If it were not so it would be the means of giving debtors the power of defeating their creditors who were proceeding at law for the recovery of their debts.

THE VICE CHANCELLOR.

I think the proper description of a bankrupts commission is, one in which he has gained the management of his own estate under the commission by prevailing with the petitioning creditor to sue out the commission and by procuring the nomination of assignees who act under his influence. In the present case it is admitted that the assignees were not chosen under the influence of the bankrupt, and are well qualified for their office, and likely to act fairly. I cannot therefore make any order upon this petition.

Petition dismissed.

Sir Samuel *Romilly* and Mr. *Wingfield* for the solicitor

Mr. *Wetherell* for the assignees.

IN RE DUNLOP.—In the Matter of **BEASLEY.** LINC. INN.
3rd Aug.
1818.

N Bell, **William Bell**, **R. G. Beasley**, and **Walter** Judgment of
carrying on business under the firm of **William** outlawry
John Bell and Co. became indebted to **W. Bowie.** against two of
On **N Bell** dying, **W. Bowie** afterwards brought an three joint
against the three surviving partners to recover debtors does
not make the
debt a sepa-
rate one as
against the
third debtor,
and it cannot
be proved un-
der his sepa-
rate commis-
sion.
On the 11th of **John Bell** and **Walter Bell** being abroad,
obtained judgment of outlawry against them,
and proceeded in the action against **Beasley.** On the
11th of **December**, 1815, **Beasley**, by his attorney, signed
a writ, which was in the following words.

At the King's Bench.

Between **WASHINGTON BOWIE**, Plaintiff,

and

REUBEN GAUNT BEASLEY, (sued with
JOHN BELL and **WALTER BELL**, who
have been outlawed) Defendant.

The above-named **Reuben Gaunt Beasley** doth
by confess this action, and consents that final
judgment may be forthwith entered up therein against
of record, for the sum of £808. 10. with future
costs; the costs to the present time having been paid.
It is agreed that no execution shall issue on the
judgment, if the said **Reuben Gaunt Beasley**
pay, or cause to be paid, to the above-named
plaintiff, or his attorney, the sum of £808. 10. upon
or before the 27th day of *January* now next ensuing.
The said **Reuben Gaunt Beasley** doth hereby

1818. “ further agree, not to bring any writ of error, or file
Ex parte “ any bill in equity, or do any other act to delay the
DUNLOP “ payment of the said sum of £808. 10.—and in case
 —In the “ default shall be made in payment of the same, that
 Matter of “ the said plaintiff shall be at liberty to levy all future
BEASLEY. “ costs, the sheriff's poundage, officers fees, and all
 “ incidental expences. Dated this 1st day of *Decem-*
 “ *ber*, in the year of our Lord, 1815.”

On the 12th *January*, 1816, a commission of bankrupt issued against *Beasley*, upon an act of bankruptcy committed 20th *November*, 1815. *Bowie* proved his debt under *Beasley's* commission as a separate debt; the commissioners being of opinion that the effect of the cognovit was to make the debt a separate one against *Beasley*. This petition was presented to expunge the proof.

Mr. Bell and *Mr. Lovat* for the petition, insisted, that as the cognovit was signed after an act of bankruptcy, and within two months before the issuing of the commission, it was altogether void; but that even admitting the cognovit to be a valid instrument, still it did not amount to any thing more than the mere confession of the action, and did not make the debt a separate debt as a judgment would have done.

Mr. Horne, in support of the proof, argued, that the cognovit made the debt a separate one. That a judgment of outlawry having been obtained against the two partners, enabled the petitioner to proceed against *Beasley* alone. That the right to proceed against one of several debtors for the same individual debt was the feature distinguishing a joint from a separate debt, and which distinction was always held to carry with it the right of proof against the separate estate.

The VICE CHANCELLOR.

The judgment of outlawry against the other partners did not change the nature of the debt. It merely enabled the plaintiff to proceed with his action against *Beasley*, as if his partners had been in court. The cognovit (if valid) was nothing more than a confession of the right of action, and an authority to sign judgment and did not, as a judgment would have done, make the debt a separate debt. The cognovit, however, was given after the act of bankruptcy, and within two months before the issuing of the commission, and was therefore void.

1818.

Ex parte
DUNLOP
—In the
Matter of
BRASLEY.

Ex parte STONE.—In the Matter of BRUIN.

LINC. INN.
4th Aug.
1818.

A PETITION had been struck out of the paper, as no one appeared when it was called.

Application to
permit a peti-
tion to be
signed by the
petitioner's
agent in Lon-
don granted,
it being near
the end of the
sittings after
Trin. Term.

Mr. *Whitmarsh* applied to have it restored, on the ground of mistake on the part of the solicitor. His honor, the Vice Chancellor, refused the application, but permitted a petition to be presented for restoring and hearing the petition stating the reason why the petitioner had not appeared when the petition was called on.

Mr. *Whitmarsh* now requested his Honor to suffer this petition to be signed by the petitioner's agent in town, the petitioner living at some distance in the country.

The VICE CHANCELLOR.

I think the application is reasonable, for otherwise you will not be able to get the petition heard at these sittings.

LINC. INN. *Ex parte COLES,—In the Matter of COLES.*
 4th Aug.
 1818.

Petition by
 the bankrupt
 to expunge the
 proofs of
 various credi-
 tors dismissed
 as being mul-
 tifarious.
 Costs not
 given out of
 the estate on
 the ground
 that it would
 be hard upon
 the other cre-
 ditors whose
 debts were in-
 disputable.

THIS was a petition by the bankrupt to expunge proofs that had been made by various creditors upon certain bills of exchange. The petitioner alledged that some of the bills were void in their first formation, as being made upon an usurious contract; and that others were void, as the consideration arose out of gambling transactions.

Mr. G. *Wilson*, on behalf of one of the creditors, insisted that the petition was multifarious, and ought to be dismissed.

The Vice Chancellor, on the ground of multifariousness, dismissed the petition; but refused to give the creditors who opposed the petition their costs out of the estate, as that would be to make the creditors whose debts were beyond dispute, contribute to the defense of doubtful debts.. He said it certainly was a hardship upon the creditors whose debts were impugned that they could not receive their costs, but the evil arose out of the principle in bankruptcy, that costs could not be given against the bankrupt.

Ex parte BROOKES.—In the Matter of
BENTLEY.

LINC. INN.
4th Aug.
1818.

The VICE CHANCELLOR.

THIS petition is presented to supersede the commission on the ground of a concerted act of bankruptcy which would avoid the commission at law.—The petitioning creditor admits the concert, but urges that no convenience will attend the superseding of it, as a new commission will immediately issue upon an act of bankruptcy that was not concerted. The petitioner objects, that the late act of parliament makes the proceedings evidence, unless notice be given that the bankruptcy is to be disputed, but that in this case, where the act which appears upon the proceedings is invalid, the estate will not have the benefit of this provision, for the bankruptcy will always be disputed, and the assignees will always be put to the trouble and expence of proving a valid act of bankruptcy. In the case that has been cited (a) the Lord Chancellor though he felt it would be very beneficial to all parties to let the commission proceed, yet refused to do so, on the ground that the court to which the jurisdiction in bankruptcy was entrusted by the legislature, would not support a commission illegally issued and founded in a fraud practised upon the court. If therefore there were not the inconveniency attending this commission which has been mentioned, I could not let it proceed.

(a) *Ex parte Prosser*, ante 77.

1818. Let the commission be superseded.

Ex parte
BROOKES. The *Solicitor General* and Mr. *Collinson*, for the
—In the petition.
Matter of
BENTLEY.

Sir Samuel *Romilly* and Mr. *Montagu*, opposed it.



EASTER TERM. 1816. *Ex parte* BOWLER and another.—In the Matter of
WETHERELT. (a)

Witness
who had been
before sum-
moned, or-
dered to attend
the commi-
sioners to be ex-
amined, touch-
ing the act of
bankruptcy

Leaving the
order at the
place where
the witness
resided when
served with
the summons
ordered to be
good service.

THE petition verified by affidavits, stated that the petitioners were the petitioning creditors, and that the commission was opened by the major part of the commissioners therein named on the 14th of *March* last, and the proofs of the debts due to the petitioners from the bankrupt were then taken, but the petitioners not being prepared with evidence of the trading and act of bankruptcy, the commissioners adjourned to the 17th of *March*.

That Harriet *Hoavenden*, and Elizabeth *Poett*, the shopwoman of *Wetherelt*, on the 16th of *March*, were severally personally served with summonses subscribed by the major part of the commissioners, requiring them to appear before them on the 17th day of *March*, then and there to be examined. That after Elizabeth *Poett* was so served, *Wetherelt's* wife entered into a conversation with the solicitor's clerk to the commission, and informed him that if he would leave the sum of £2 with her, she might perhaps allow Elizabeth *Poett* to attend,

(*Ex relatione.*)

But even then she did not know whether Elizabeth *Poett* should attend or not, but would consult her attorney, or used words to that effect, and the said sum of £2 was accordingly paid to the said Elizabeth *Poett* when she was so summonsed for her travelling expences to London to attend before the said commissioners.

1818.
Ex parte
BOWLER
and another
—In the
Matter of
WETHERELL

That Harriet *Hoavenden* appeared on the said 17th of *March*, before the major part of the said commissioners and was examined by them, touching the trading and act of bankruptcy of *Wetherell*, when the trading was fully proved, but the proof of the act of bankruptcy not being satisfactorily made out, the commissioners required further evidence thereof to be given.

That Elizabeth *Poett* did not appear to be examined in pursuance of the said summons, and during the time the said commissioners were sitting on the said 17th of *March*, a woman came to the solicitor's clerk, who was attending the commissioners, and returned to him the summons which had been served on the said Elizabeth *Poett*, together with the sum of £2, which had been paid to her, the woman informing him that she had been desired to deliver the same to the solicitor, but she refused to inform him by whom she had been desired so to do.

That the petitioners had caused inquiries to be made for Elizabeth *Poett* at the house of *Wetherell*, where she resided as shopwoman, and where she was served with the commissioners summons, and also at various other places in Rochester, and also at Kingston, in the county of Surry, and at Greenwich in the county of Kent, where her relations resided, for the purpose of tracing out and serving her with a second

1818. *summons, to attend before the said commissioners to be examined, but without effect, and the petitioners believed that the said Elizabeth Poett did keep, or was kept out of the way for the purpose of avoiding such service, and from information which the petitioners had obtained, was after the service of the said first summons secreted in the upper part of the house of Wetherelt.*

Ex parte
BOWLER
and another
—In the
Matter of
WETHERELT.

That the time allowed to the petitioners for prosecuting the commission under the general order for that purpose expired on the 28th day of *March* last, and the commission was superseded upon the petition of John *Wetherelt* on the 31st of *March* last, but a writ of procedendo (a) therein bearing date the 3rd

The Form of the Writ of Procedendo,

(See ante 45.)

(a) George the Third by the Grace of God, &c. To our trusty and well beloved J. B. H. W., J. S. C. E. L. and J. D. Esquires, greeting, whereas we being informed that James *Wetherelt* of the city of Rochester, in the county of Kent, hatter and hosier, dealer and chapman, using and exercising the trade of merchandize, by way of bargaining, exchange, bartering and chevizance, seeking his trade of living by buying and selling about, did become bankrupt within the several statutes made against bankrupts. To the intent to defraud and hinder William *Bowler*, of Castle Street, in the borough of Southwark, in the county of Surry, hat manufacturer, and Robert *Mauwell* and Matthew *Tren- cy*, of the Old Change, Cheapside, in the city of London, straw hat manufacturers, and co-partners, and others his creditors, of their just debts and duties to them due and owing, and we minding the execution of the said several statutes made against bankrupts, did by our commission under the great seal of Great Britain, bearing date at Westminster the 14th day of March in the fifty-eighth year of our reign, name, assign, appoint, constitute and ordain you our special commissioners, thereby giving full power and authority to you four or three of you, to proceed according to the said statutes

day of April instant, under the Great Seal of Great Britain had been awarded and issued in pursuance of an order made by his Lordship, upon the petition of the petitioners for that purpose.

1818.

Ex parte
BOWLER
and another
—In the
Matter of
WETHERELL.

and all other statutes in force concerning bankrupts, not only concerning the said bankrupt, his body, lands, tenements, freehold and customary goods, debts and other things whatsoever, but also concerning all other persons who by concealment claim, or otherwise, did, or should offend touching the premises or any part thereof contrary to the true intent and meaning of the said statutes, and to do and execute all, and every thing and things whatsoever, as well for and towards satisfaction and payment of the said creditors as towards and for all other intents and purposes according to the ordinance and provision of the same statutes willing and commanding you four or three of you to proceed to the execution and accomplishment of that our commission with all diligence and effect. And whereas John Wetherell of High Street, Chatham, in the county of Kent, coal merchant by his humble petition exhibited to our Lord High Chancellor of Great Britain, for the reasons therein contained, praying that the said commission might be superseded, whereunto we graciously inclining, did by our writ of supersedeas under the

great seal of the united kingdom of Great Britain and Ireland, bearing date the 31st of March, in the 58th year of our reign, will and command you and every of you to stay and surcease all further proceedings upon the said commission as our special trust was in you reposed, now as much as the said William Bowler. Robert Mauwell, and Matthew Trency, by their humble petition exhibited to our Lord High Chancellor of Great Britain, for the reasons therein contained, pray that our said commission might be proceeded in as if the same had not been superseded, whereunto we now graciously inclining, do by these presents will and command you four or three of you to proceed upon the said commission as if the same had not been superseded, and that you put the same in execution, as if the same commission had not been superseded as our special trust is in you reposed, witness ourself at Westminster the third day of April, in the fifty-eighth year of our reign.

From the tenor of this writ it appears that the writ of supersedeas does not vacate the commission, but merely renders it dormant,

1818. That Elizabeth *Poett* was a material and necessary witness to prove an act, or acts of bankruptcy, and *Ex parte* that without her attendance before the commissioners, *Bowler* and another. for the purpose of being examined thereon the said commission could not be proceeded in. And *In the Matter of* *Wetherelt*.

So also in superseding the commission of the peace by a writ of supersedeas, the power of the justices is not thereby totally destroyed, but may be revived by the writ of procedendo. 1 Black. Com. 353. It seems always to have been held that a supersedeas would prevent a criminal prosecution. Lord *Hardwicke* said, that Lord *Macclesfield* did in more instances than one supersede a commission where the bankrupt had not surrendered himself within the 42 days, and that he took that method to prevent a prosecution, *ex parte Wood*, 1 Atk. 221, and in *ex parte Bullock*, 1 Taunt 82, the whole argument proceeds upon the admission, that if the commission had been first superseded it would have prevented the prosecution of the bankrupt for embezzling the property.

When the supersedeas issues after the execution of the bargain and sale by the commissioners to the assignees, it has been doubted whether it would have the effect of divesting the estate of the assignees. This objection was taken in a recent case by a purchaser of the bankrupts estate, a prior commission having been superseded.

The supersedeas divests the estates conveyed to the assignees by the bargain and sale of the commissioners.

The Lord Chancellor said if this objection could be supported, it would be a very formidable one; but the court has been for ages in the habit of calling upon the second assignees in cases where a first commission has been superseded to confirm the sale made by the former assignees. Now it need not have done that if the legal estate notwithstanding the supersedeas still remained with the first assignees.

Mr. *Montagu* took the objection.

Mr. *Cooke* opposed it.

The title of the petition was *Ex parte Smith*.—In the matter of *Sheath*, and it was heard 19th of Feb. 1817.

It is upon this principle where sales have taken place that the court will not supersede the commission though 20s. in the pound have been paid to the creditors. *Twogood v. Hankey*, ante 65, or for fraud, *ex parte Edmonds*, 10 Ves. 104. But where it is necessary to give effect to a second commission it is usual to direct the proceedings under the first to be impounded in the office of the secretary of bankrupts, *ex parte Wilson*, in the Matter of *Colbeck*, ante 48.

from information which the petitioners had obtained of concealment of property belonging to the estate of *Wetherelt*, it was material to the benefit of the petitioners and the other creditors, that the commission should be established forthwith. And the petitioners therefore, prayed that his Lordship would be pleased to order that the said Elizabeth *Poett*, should attend the said commissioners in the said commission named, or the major part of them, at such time or place as they should appoint to be by them examined, touching the act or acts of bankruptcy on the part of *Wetherelt*, and that the service of the said order and appointment thereon, by leaving a copy thereof for the said Elizabeth *Poett* at the dwelling house of *Wetherelt* where she resided at the time of the service of the said first summons, and where she was served therewith, might be deemed good and sufficient service on the said Elizabeth *Poett*.

1818.
Ex parte
BOWLER
and another
—In the
Matter of
WETHERELT.

April the 9th, 1818. The Lord Chancellor made an order according to the prayer of this petition.

In support of the latter part of the prayer as to the service of the order, the assistant to the messenger made an affidavit, that he had been unable after using great diligence to find Elizabeth *Poett*, and that he had been informed and believed it to be true, that she was secreted in an upper room of the bankrupt's house, for the purpose of avoiding being served with the commissioners second summons. The Lord Chancellor said that was sufficient to induce him to grant the order as prayed.

Mr. *Whitmarsh* for the petitioners.

LIN. INN.
21 July,
1818.

CROWLEY'S CASE.

The Lord Chancellor can issue the common law writ of habeas corpus in the vacation time.

A bankrupt being committed by the commissioners for not answering, it appeared that in the questions put to him, the commissioners had stated facts of which they were informed by the deposition of the messenger but the deposition was not set forth in the warrant nor did it thereby appear to have been read to the bankrupt at the time of his examination. Held that the commitment was substantially insufficient and that the court could not commit the bankrupt under 5 Geo. 2. c. 30, s. 17.

If in committing a bankrupt for not answering satisfactorily the commissioners are influenced by extrinsic evidence, quare, the validity of the commitment.

CROWLEY a bankrupt on the 18th of *June*, 1816, had been committed by the commissioners for not answering to their satisfaction the questions put to him.

The warrant of commitment was as follows.

At Guildhall, London, 18th day of June, 1816.

WHEREAS His Majesty's commission under the great seal of Great Britain, grounded upon the several statutes, made and now in force, concerning bankrupts or some or one of them, bearing date at Westminster the 7th day of *March*, 1815, in the 55th year of his present Majesty's reign hath been awarded and issued against *John Crowley*, late of *St. James's Street*, in the parish of *St. James*, Westminster, in the county of *Middlesex*, tavern keeper, wine merchant, dealer and chapman, directed unto *G. W.*, *A. E. I.*, *M. F. A.*, *W. V. S.* and *R. G.* Esquires, any four or three of them. And, whereas, the said commissioners in the said commission named. or the major part of them, having first respectively taken the oath appointed by an act of parliament, passed in the 5th year of the reign of His late Majesty King George the Second, intituled "An act to prevent the committing of frauds by bankrupts" for commissioners of bankrupts to take before they act as commissioners in the execution of the powers or authorities given and granted by the said act or acts of parlia-

ment, the commissioners are influenced by extrinsic evidence, quare, the validity of the commitment.

ment now in force concerning bankrupts, and having begun to put the said commission into execution upon due examination of witnesses and other good proofs, upon oath before them had and taken, did find that the said John *Crowley* before the date and issuing forth of the said commission, did become bankrupt within the true intent and meaning of some or one of the statutes, made and now in force concerning bankrupts, and did adjudge and declare the said John *Crowley* bankrupt accordingly. And whereas the major part of the said commissioners, did cause notice to be given in the London Gazette, that the said John *Crowley* was thereby required to surrender himself to the said commissioners in the said commission named, or the major part of them on the 15th day of *April*, 1815, on the 22nd day of *April*, 1815, on the 20th day of *May*, 1815, at one of the clock in the afternoon on each of the said days, on the 8th day of *July*, 1815, at ten o'clock of the forenoon on that day, on the 26th day of *August*, 1815, at ten o'clock in the forenoon on that day, on the 2nd day of *December*, 1815, at one o'clock in the afternoon on that day, on the 13th day of *January*, 1816, at one o'clock, in the afternoon on that day, on the 24th of *February*, 1816, at one o'clock in the afternoon on that day, and on the 4th of *June* instant, at one o'clock in the afternoon on that day, and on the 18th day of *June* instant, at twelve o'clock, at Guildhall, London, in order to finish his examination, and make a full disclosure and discovery of his estate and effects, and being then and there duly sworn and required by us to make such disclosure and discovery we being the major part of the commissioners in the said commission named, whose hands and seals are hereunto subscribed and set, having first respectively taken the oath above mentioned, appointed to be taken by commissioners of bankrupt, did cause the follow-

1818.
CROWLEY'S
CASE.

1818. **CROWLEY'S CASE.** ing question to be propounded to him the said John Crowley, that is to say: Question. On the fourth of *June* last when you appeared before the commissioners at Guildhall to pass your last examination, you had no accounts ready to present to them, you then requested the commissioners to adjourn your last examination, undertaking to produce your accounts to your assignees on Thursday then next ensuing. On the fourteenth of *June* you were brought up to be examined before the commissioners, and upon being asked whether you had produced your accounts to your assignees, you stated that you had not, and could not, because your books and papers were in the possession of a friend of your's, a Mr, *Hamilton*, at No. 122, in the London Road, to whom you had delivered them since your bankruptcy, who refused to redeliver them to you. The commissioners have since that time issued their summons to bring *Hamilton*, before them, but it appears from the deposition of the messenger, that, although he waited on Saturday night till between twelve and one o'clock, for the return of *Hamilton* to his lodgings, and went again to his lodgings at eight o'clock on Monday morning, that he was not able personally to serve *Hamilton*, who had returned home after the time above stated on Saturday night, and had gone out again before the messenger arrived again on Monday morning. It likewise appears to the commissioners from the deposition of their messenger, that a woman in the house had informed Mr. *Hamilton*, he, the messenger had been there, who replied, " he knew what he wanted, but that all the proceedings were illegal, and that was an end of it." Have you any accounts now to produce to the commissioners, or any further reason to give, why you do not produce them? Answer. I have no accounts to produce, and I have no further reason to give why I do

not produce them, except, that I have two petitions before the Chancellor to supersede this commission, the first, upon the grounds of a commission being now in force against me, bearing date in 1808; and the second, of no act of bankruptcy to this commission, but still am ready to render every account possibly in my power to the commissioners. Which answer of the said John *Crowley* not being satisfactory to us, the said commissioners, These are therefore to will, require and authorize you immediately upon receipt hereof to take into you custody the body of the said John *Crowley*, and him safely convey to His Majesty's prison of the King's Bench, and him there to deliver to the marshal, keeper, or warden of the said prison, who is hereby required and authorized by virtue of the commission and statutes aforesaid, to receive the said John *Crowley* into his custody, and him safely keep and detain without bail or mainprize, until such time as he shall submit himself to us the said commissioners, or the major part of the commissioners by the said commission named and authorized, and full answer make to our or their satisfaction to the question so put to him by us as aforesaid: and for so doing this shall be your sufficient warrant given under our hands and seals at Guildhall, London, this 18th day of *June*, in the year of our Lord 1816.

1818.
CROWLEY'S
CASE.

In the vacation after Trinity Term, 1818, *Crowley* moved the Lord Chancellor for the writ of habeas corpus, which accordingly issued, and he was brought up into court.

Mr. *Rose* on behalf of the assignees previous to discussing the validity of the commitment, insisted that according to the statute (a) the bankrupt could not

(a) 31 Car. II. c. 2, s. 4.

1818. **CROWLEY'S CASE.** have any writ of habeas corpus granted to him in vacation time, as he had neglected to pray for it for two terms after his imprisonment.

But upon inspecting the writ, it appeared to be the common law and not the statutable one, as it was not marked in the manner required by the act (a).

Mr. *Rose* upon the authority of *Jenke's case* (b), objected that at common law, the Lord Chancellor could not issue the writ in the vacation.

But after Sir Samuel *Romilly*, and Mr. *Cullen* had been heard on the other side.

The LORD CHANCELLOR,

Overruled the objection (c).

The preliminary objections being disposed of, the validity of the commitment came on to be argued.

Sir Samuel *Romilly* and Mr. *Cullen* for the bankrupt.

The commissioners have only authority to commit the bankrupt, in case he shall refuse to answer to their satisfaction all lawful questions put to him, or shall refuse to sign his examination (d), but it appears upon the face of this warrant, that the bankrupt was com-

(a) Car. II. c. 2, s. 3.

(b) 7 State Trials, by Hargrave, 467.

(c) Ex relatione.

(d) 5 Geo. II. c. 30. s. 16,

mitted on the evidence of the messenger, and not because he refused to answer to the satisfaction of the commissioners.

1817.
CROWLEY'S
CASE.

The satisfaction mentioned in the statute is limited to answers given by the bankrupt to questions put by the commissioners. If they are dissatisfied with his answers they may commit him, but then that dissatisfaction must altogether arise from the answers of the bankrupt himself, and not from the influence of evidence which they have received aliunde. If the commissioners examine third persons, and contrast their testimony, with the answers of the bankrupt, although upon the balance of the evidence they may feel assured that the bankrupt is not speaking the truth, yet as their dissatisfaction with the bankrupt is caused by the admission of extrinsic evidence, they have not the power to commit him. But admitting for the purposes of this argument, that they have such power, then according to the statute (a) the deposition of the messenger ought to have been embodied in the warrant of commitment, or otherwise, how is His Lordship to determine, whether the answers are satisfactory or not. If the messenger's deposition had been set forth in the warrant, it might have appeared that the commissioners had suffered it to have undue influence with them, and that the answers of the bankrupt were satisfactory.

Mr. *Rose* for the assignees, insisted upon the sufficiency of the warrant, but if the court should be of a contrary opinion, he submitted that the insufficiency was in the form and not in the substance of the warrant,

(a) 5 Geo. II. c. 30, s. 17.

1817. **CROWLEY'S** and therefore, that his Lordship under the provisions of the statute would recommit the bankrupt (a).
CASE.

The LORD CHANCELLOR.

The party is brought before me by a writ of habeas corpus, and the duty imposed upon me is to determine, first, whether the warrant of the commissioners be sufficient or not, and secondly, if it be insufficient, whether the insufficiency be in the form or the substance of the warrant. The principle is, that when the validity of the commitment is discussed upon the return of the habeas corpus, the court cannot travel out of the warrant of commitment, for I take the principle to be the same in this court as it is in the courts of law, where the judges have not the means of informing themselves as to what passed at the examination by an inspection of the proceedings, which I as Lord Chancellor am enabled to do. This is one of the most painful jurisdictions imposed upon the court; for the old law being altered, which was, that a bankrupt could not be committed if he roundly answered, that he knew nothing about the question put to him, it has thrown the difficulty upon the judge of deciding the probability of the answer being fair and reasonable. In this case it is impossible not to believe that the minds of the commissioners were influenced by something that had passed at a previous time. Let any one read the warrant, and then ask himself whether that is not so? The question is, "On the fourth of *June* last, when "you appeared before the commissioners at Guildhall "to pass your last examination, you had no account "ready to present to them, you then requested the

(a) 5 Geo. II. c. 30, s. 17.

“ commissioners to adjourn your last examination undertaking to produce your accounts to your assignees on Thursday then next, ensuing. On the 14th *June*, you were brought up to be examined before the commissioners, and upon being asked whether you had produced your accounts to your assignees, you stated you had not and could not, because your books and papers were in the possession of a friend of yours a Mr. *Hamilton*, at No. 122, in the London Road, to whom you had delivered then since your bankruptcy, who refused to redeliver them to you.”

1818.
CROWLEY'S
CASE.

I pass over that part of the warrant for the present relating to the messenger's deposition. Then he is asked, “ Have you any accounts now to produce to the commissioners, or any further reason to give why you do not produce them?” Now it must be recollected that this question is put to a man, who had before at a previous examination, stated that he could not produce his accounts. To this question he answers, not waiving his former answer, “ I have no accounts to produce, and I have no further reason to give why I do not produce them, except that I have two petitions before the Chancellor, to supersede this commission, the first upon the grounds of a commission being now in force against me, bearing date in 1808, and the second of no act of bankruptcy to this commission, but still am ready to render every account possibly in my power to the commissioners.” There does not appear to me to be any thing upon this commitment as I have read it, that enables me to say the answers were not satisfactory. Now as to the matter of the messenger's deposition, it is to be observed so far as appears from the warrant of commitment, that it goes to confirm the statement made by the bankrupt upon his examination.

1818. **CROWLEY'S**
CASE. As it is not necessary for the determination of this case, in the view I take of it, I shall leave the point raised by Mr. Cullen, viz. whether commissioners ought to look for extrinsic information in their examination of the bankrupt, as I find it, untouched. In this case the commissioners have done so, but it does not appear that the deposition was ever read to the bankrupt, nor does it appear what the deposition was, otherwise than as it is stated in the question put by the commissioners. If a question be put to a bankrupt, embodying an answer given by him on a preceding day, and if he do not deny, or in any manner qualify it, the court will assume it to be true, that he did give such an answer upon the former occasion. One sees the principle upon which the court acts with relation to a bankrupt's own declarations, but when the statement put to him consists of the declarations of third persons, of which he must be taken to be ignorant, how can his silence be construed, as an admission of the truth of such declarations. What is the principle the act goes upon in requiring the commissioners to specify the questions put? It is that the court upon the return of the writ, may understand what the nature of the questions put to the bankrupt were. I therefore think the warrant is defective as it calls upon me to determine upon the effect of a deposition which I cannot read. It is clear to me the deposition had its weight with the commissioners, and that they meant to call its contents to the bankrupt's attention. I do not think the insufficiency of the warrant is merely formal. It is a defect as substantial as neglecting to state a second examination. That was the defect in *Coombe's case (a)*.

(a) 2 Rose, 396.

But the Judges with whom I then consulted, thought the defect substantial. I therefore am of opinion the bankrupt must be discharged.

1818.

CROWLEY'S
CASE.



HARLOW v. CROWLEY and others (a).

IN THE
EXCHEQUER.
Mich. Term.
1818.

THE bill in this suit prayed that *Crowley* who had been declared a bankrupt, and the two other defendants *Reay* and *Taylor*, his assignees might interplead, and settle and adjust between themselves, their demands against the plaintiff, the plaintiff offering to pay a debt which he had contracted with the bankrupt, to either of them to whom the same should appear of right to belong, and in the mean time to bring the money into court. The bill stated that the plaintiff was indebted to the bankrupt and would have paid him had it not been for his alledged bankruptcy. That a commission of bankrupt had issued against him, under which *Reay* and *Taylor* were chosen his assignees, and since the issuing of the commission the bankrupt had commenced an action at law for the recovery of the debt. That notice of trial of the action was given by the bankrupt, and the plaintiff being advised that it was necessary for his defence to prove the bankruptcy, he was put to a great expence to bring his witnesses to the trial for that purpose, but when the time came, the trial was put off by the bankrupt who withdrew the record. That the bankrupt had always disputed the validity of his com-

A debtor of the bankrupt cannot support an interpleading bill against the bankrupt and his assignees.

(a) *Ex relatione.*

1818. mission, and had presented a petition to the Lord
 HARLOW Chancellor to supersede it.

v.
 CROWLEY, The bankrupt by his answer, admitted, that a commis-
 and others. sion of bankrupt had issued against him, and that he was
 found and declared a bankrupt, and that the other de-
 fendants were chosen his assignees, but he denied that
 he was duly found a bankrupt. He admitted that he
 had brought an action against the plaintiff, but he said
 that any delay in prosecuting the action was to be at-
 tributed to the neglect of his attorneys, and that the
 record was withdrawn at the trial without his know-
 ledge or consent, and contrary to his wishes, and that
 he was desirous and intended to proceed in the action.
 He admitted that he had presented a petition to the
 Lord Chancellor to supersede his commission, and
 that he had brought three actions at law touching the
 commission, in one of which the validity of the com-
 mission was intended to have been tried, but the point
 was not raised, and the other two actions were then
 depending; he further stated his belief that the
 assignees insisted that the commission duly issued,
 and that he was duly declared a bankrupt, but he denied
 to the best of his belief, that the assignees had
 threatened to proceed at law against the plaintiff, or that
 they had applied to the plaintiff for the payment of the
 debt. The plaintiff had obtained an injunction upon
 the coming in of the bankrupt's answer.

Mr. *Sidebottom* shewed cause why the injunction
 should not be dissolved.

Mr. *Cullen* and Mr. *Koe* appeared for the bankrupt.

THE LORD CHIEF BARON.

The commission is in force. The moment you shew

a valid commission there is an end of the action. I never heard of a bill of interpleader, between a bankrupt and his assignees.

1818.
HARLOW
v.
CROWLEY
and others.

The other barons concurred.

Injunction dissolved (a).

(a) Where a debtor had filed a bill of interpleader against persons declared bankrupts (but who disputed the validity of the commission) and against their assignees the Lord Chancellor granted an injunction to stay the action brought by the bankrupt. *Lowndes v. Cornford*, 1 Rose, B. C. 180. 18 Ves. 299. S. C.

Ex parte SCOTT and others.—In the Matter of LINC. INN.
THOMAS NIAS and JOSEPH WHITE. 10 Aug.
1818.

THIS was an appeal to the Lord Chancellor from an order made by the Vice Chancellor. The petitioners, eight of whom were creditors of the bankrupts, and *Watts* and *Wingfield* two of the assignees, on the 10th of June last preferred their petition, shewing that previous to the issuing the commission of bankrupt, the said *Thomas Nias* and *Joseph White* carried on business in partnership, as insurance brokers, at Broad Street in the city of London. That the said *Thomas Nias* was in or about the month of January, 1816, possessed of a farm of considerable extent, at Chingford, in the county of Essex, and he resided at a house upon the said farm, known by the name of

Upon a petition to stay a certificate imputing conduct to the bankrupt which if proved would amount to felony the court will not direct an issue to try the fact of conformity.

1818. Chingford Hall. That the said house was well furnished, and contained a great quantity of excellent furniture, china, wines, and other property of considerable value. That on or about the 24th day of *May*, 1816, a commission of bankrupt, was issued against the said Thomas *Nias* and Joseph *White*, under which they were declared bankrupts, and George *Armstrong*, John Turner *Watts*, Richard *Oliverson* and John *Wingfield* were chosen assignees, and the usual assignment was duly executed to them. That the said Thomas *Nias* upon passing his final examination under the said commission, did not disclose that he had any interest in the said lease, or farm or in any way notice the same in his balance sheet. That the petitioners have since discovered that at the time he so passed his examination, he was then residing and has ever since resided at Chingford Hall aforesaid. And that he is the only person who has any interest in the said lease. That shortly after the said Thomas *Nias* passed his final examination, the said assignees discovered that the interest of the said Thomas *Nias* the bankrupt in the aforesaid farm had been assigned, or pretended to be assigned, shortly previous the issuing of the said commission to his brother George *Nias* for the purpose of defrauding the petitioners. That the said assignees caused various persons to be examined before the commissioners, and which examinations are reduced into writing and are filed upon the proceedings under the said commission, and are as follows. (The petition here recited the examinations of the bankrupt and of several witnesses, the tendency of which were to charge the bankrupt with embezzling the estate) and further shewing that the petitioners were very much dissatisfied with the conduct of the said Thomas *Nias* under the said commission, and believed

Ex parte
SCOTT
and others.
—In the
Matter of
T. NIAS
and
J. WHITE.

hat a very great portion of his property had been se-
 creted, and was still withholden by him from his cre-
 ditors, but which without further examination under
 the said commission, they were then unable to prove. ^{1818.}
 That they were then proceeding to such examina- ^{Ex parte}
 tions. That by an advertisement in the London gazette ^{SCOTT}
 of the 20th day of *May* last, the petitioners disco- —In the
 vered that the certificate of conformity of the said ban- Matter of
 krupt *Thomas Nias*, under the said commission had T. NIAS
 been signed by the acting commissioners. That the and
 said certificate then lay before his Lordship for con- J. WHITE.
 firmation. And therefore, praying his Lordship that
 the confirmation of the said certificate might be
 stayed, and that his lordship would make such further
 order in the premises, as to his Lordship should seem
 meet. This petition coming on to be heard, his honor
 the Vice Chancellor made the following order. “ Now
 “ upon hearing the said petition read and what was al-
 “ ledged by the counsel for the said parties, I do order
 “ that the parties proceed to a trial at law in His Majes-
 “ ty’s court of king’s bench at Westminster, at the sit-
 “ tings after easter term next, upon the following issue,
 “ viz. Whether the said agreement entered into between
 “ the said *Thomas Nias* and his brother *George Nias* for
 “ the purchase of the said farm, was a bona fide transac-
 “ tion and agreement, or made for the purpose of de-
 “ frauding the just creditors of the said *Thomas Nias*
 “ the bankrupt, in which issue the petitioners to be
 “ plaintiffs, and the said *Thomas Nias* the bankrupt, de-
 “ fendant, who is to name an attorney to appear, receive
 “ a declaration and plead to issue, and it is hereby re-
 “ ferred to Mr. *Alexander*, one of the masters of the
 “ court of chancery, to settle the said issue between the
 “ parties in case they shall differ about the same, and the
 “ assignees of the estate and effects of the said bankrupt,

1818. " and all proper parties are to produce upon the trial of
Ex parte " the said issue, all such books, papers and writings in
 SCOTT " their respective custody or power relating to the mat-
 and others. " ters in question as any of the parties shall require, upon
 —In the " reasonable notice to be given for that purpose, and the
 Matter of " remainder of the matter of the said petition not yet
 T. NIAS " gone into. The consideration of the second petition
 and " presented to me in this matter and not yet heard by
 J. WHITE. " me; as also the consideration of all further directions
 " therein, together with the consideration of costs are
 " hereby reserved until after the trial of the said issue,
 " when any of the parties are to be at liberty to apply to
 " me in relation thereto, as they shall be advised, when
 " such further order shall be made as shall be just.
 " And I do further order that the allowance and confir-
 " mation of the said certificate be, and the same is here-
 " by stayed until my further order."

From this order the petitioners appealed. Previous to the discussion of the facts of the case, the counsel for the petitioners took a preliminary objection to the order. They contended, as a general proposition, that the court could not upon a petition to stay a certificate direct an issue to try the fact of conformity, which the legislature had entrusted solely to the judgment of the commissioners, subject to having their adjudication revised by the Lord Chancellor. That it was quite clear if the commissioners refused, the Lord Chancellor could not compel them to sign the certificate. If they signed improperly the Lord Chancellor might refuse to allow it, but he could not direct an issue to try the conformity, as that would in fact be to make the jury the judge of the appeal from the decision of the commissioner.

1818.

The LORD CHANCELLOR.

Ex parte
SCOTT
and others.
—In the
Matter of
T. NIAS
and
J. WHITE.

I do not recollect an issue ever having been directed by the court in a case of this nature (His Lordship here appealed to the bar, whether within their recollection such an issue had ever been directed, and being answered in the negative, he proceeded to say) An inveterate practice in the law generally stands upon principles that are founded in justice and convenience. If a certificate be allowed under such circumstances of conduct in the bankrupt as make it bad at law, the allowance is a nullity, but if it be withheld, the bankrupt has no means of getting it. I grant the allowance may be disputed upon grounds that could not avail if it were once allowed; and it is in judging of this sort of case, that the court is called upon to exercise a painful and an important part of its jurisdiction. One of the most important, and one of the most difficult duties of that jurisdiction is, where the court is called upon to judge of the necessity of requiring further affidavits. If therefore I should direct an issue, the bankrupt would be put in a much worse situation, than if the fact were tried by affidavits in this court where both sides are heard. But in this particular case where felony is imputed, there is an additional reason for not sending it to a jury, as the trial must necessarily involve a question of a criminal nature. I am, therefore, of an opinion that in all these cases respecting the allowance of certificates where felony is imputed, I ought not to send the parties to an issue.

Sir Samuel Romilly, Mr. Wetherell and Mr. Montagu for the petition.

1818. The bankrupt was heard on his own behalf.

Ex parte
SCOTT

Sir Samuel Romilly as amicus curiæ, suggested, and others, that according to a late decision of the Vice Chancellor — In the Matter of T. NIAS. for the examinations were not evidence against the bankrupt (a).

and
J. WHITE.

The LORD CHANCELLOR.

The Lord Chancellor has a right to look at the proceedings. The examinations would not be evidence, but they would furnish a ground for directing an examination of those persons in the presence of the bankrupt.

(a) *Ex parte Coles*.—In the Matter of *Coles*, ante. 242.

ORDER IN BANKRUPTCY.

21st. August, 1818.

LORD CHANCELLOR.

WHEREAS it hath been hitherto the practice on the petition of the bankrupt with the consent of the creditors who have proved debts under the commission, to issue a supersedeas on a petition presented after the first and before the second meeting, and in some cases when the petitioning creditor alone may have proved his debt and signed such consent, without the concurrence in, or knowledge of such proceeding by the greater number of the creditors. I do therefore order, that in future no commission shall be superseded, on the ground of such consent of all the creditors who shall have proved their debts having been given, until after the second meeting. And I do further order, that on the commissioners being satisfied at the second meeting that a petition will be presented for superseding the commission, with the consent of all the creditors who shall have proved debts, that the commissioners do in such case adjourn the choice of assignees to some future day, in order to give the opportunity of presenting such petition for a supersedeas in the manner hitherto accustomed.

ELDON, *Chancellor.*

Ex parte MILLER and BATE, } In the Matter of MIC. TERM,
Ex parte BENNETT, } GARLAND and 1818.
 others.

IN March 1815, a commission of bankrupt issued against *Garland, Magnus and Benjamin*, upon the petition of *Bennett*, and they were declared bankrupts; and *Miller and Bate* were chosen the assignees of that commission. The acts of bankruptcy upon which the commission was founded against *Magnus and Benjamin*, were, that with the intent to defraud their creditors, they had suffered themselves to be outlawed, the outlawry being completed on the 2d of July 1814. In March 1815, *Garland* committed an act of bankruptcy. *Bennett* was the solicitor of the bankrupts, and his debt originated in business done for them in the way of his profession. In June 1815, *Miller and Bate* presented their petition, charging they had discovered that no business was done for the bankrupts by *Bennett* subsequently to the month of February 1814, when all accounts between him and the bankrupts were settled and adjusted, and nothing was then due from them to him; that no business was done from that time by him for them, until August 1814, and therefore the whole of his alledged debt was for business done after the acts of bankruptcy; and praying that the commission might be suspended. Upon this petition coming on to be heard, it was referred to one of the masters of the court, to inquire and report whether *Bennett* had any and what debt to support the commission against the bankrupts. On the 19th of April 1817, the master re-

Commission supported, in a case where it had been referred to the master to see if there were a sufficient petitioning creditor's debt, and upon the reference it appeared that the petitioning creditor had, after the act of bankruptcy, been paid a sum that would reduce his debt below £. 100, on the ground that the payment could not be retained against the assignees, and that the suing out of the commission was a disaffirmance of the payment. But the petitioning creditor not having, previous to the reference, avowed that he held the payment for the assignees, was ordered to pay the costs of the petition and inquiry.

1818.

—
Ex parte
 MILLER &
 BATE.

Ex parte
 BENNETT.

—In the
 Matter of
 GARLAND
 and others.

ported that he had been attended by the solicitors of the assignees and by the said *Thomas Bennett*, the petitioning creditor, and he had proceeded to make the inquiry, and found that the said *Thomas Bennett* had a demand, arising from two bills of costs, upon the estate and effects of the said bankrupts, amounting to the sum of £.454. 0s. 1d. which said bills had been taxed. He found that the said petitioner's debt was reduced to the sum of £.283. 19s. 5d.; but it being admitted before him that the said *Thomas Bennett* had at various times received of the said bankrupts, on account of the said bill, the sum of £.199. 15s. and which with the sum of £.15. 9s. 4d. being the amount of 23d parts of a bill of costs in an action brought for coals, which belonged to one of the bankrupts individually, they made together the sum of £.215. 4s. and which being deducted from the sum of £.283. 19s. 5d. the amount of *Thomas Bennett's* taxed costs, he found that the said *Thomas Bennett* had not a debt of sufficient amount to support a commission against the said bankrupts.

To this report *Bennett* carried into the master's office objections, in the nature of exceptions. First, because the said master had excluded him from charging against the assignees a third bill of costs for £.79. 2s. 4d. incurred in endeavouring to settle the affairs of the bankrupts, including those debts on which actions had been brought before the acts of bankruptcy, in which he was retained as their attorney or agent, and also the rest of the debts of the said bankrupts, and though incurred after the act of bankruptcy in *July 1814*, of *Benjamin* and *Magnus*, yet he submitted that a former retainer was sufficient to authorize him to settle pending or old actions, though not to commence a new suit, especially as the bank-

rupt *Garland* did not commit any act of bankruptcy till long after the bill of £.79. 2s. 4d. was incurred. The amount, therefore, of which bill, when taxed, he claimed should also be added to the amount already allowed by the master. Secondly, for that though the master excluded him from charging after the act of bankruptcy in *July* 1814, yet he allowed the assignees to bring in their discharge the sum of £.200, and to charge the component sums of £.39. 5s. 0d. and £.50 against his bill of costs, though paid to him long after the act of bankruptcy, viz. on the 1st *September* 1814: whereas he submitted that no part of the said sum of £.200 should go against his bill, he not being able to retain the money paid him, if the assignees were to sue him in a court of law, which they have threatened to do; and that if any part of the said sum of £.200 be allowed to form part of the discharge, then only the component sums of £.39. 5s. and £.42. 15s. should be allowed, and not the sums of £.39. 5s. and £.50, as allowed by the master, the said sum of £.200 being appropriated to the following purposes, viz. the sum of £.114 to pay a Mr. Horwood; £.4 for deeds executed at the time of payment of the £.200; the sum of £.39. 5s. for costs for render of *Garland*; and the sum of £.42. 15s. balance of £.200, to be retained by him, which payment of £.42. 15s. being after the act of bankruptcy, he insisted should be held for the assignees, and not placed against his demand, as it was not a retainable demand against the bankrupts. Under these circumstances the assignees presented their petition, praying that the commission might be superseded. *Bennett* also presented a cross petition for the master to be directed to review his report.

1818.

Ex parte
MILLER &
BATE.

Ex parte
BENNETT.

—In the
Matter of
GARLAND
and others.

1818.

13 November 1818.

Ex parte
MILLER &

BATE.

Ex parte
BENNETT.—In the
Matter of
GARLAND
and others.

The LORD CHANCELLOR.

It was referred upon a former petition in this matter to the master, to inquire whether there was a good petitioning creditor's debt. The master has certified that there was not a debt of sufficient amount to support the commission. To this report the petitioning creditor carried in two objections, in the nature of exceptions. (His Lordship here read the certificate and the objections.) Mr. *Bennett* now presents a petition, that the master may be directed to review his report; and a cross petition is presented by the assignees to supersede the commission. By the first of his objections, this gentleman seems to think a solicitor, who is engaged in conducting legal proceedings for a client that becomes a bankrupt pending the proceedings, may charge his estate not only with the costs that were incurred previously to the bankruptcy, but also with those that arose out of transactions of a subsequent date. My own opinion is, that he cannot so charge the bankrupt's estate. As to the second objection, it appears that the master made his calculation in this way: He took an account of the receipts and payments, and struck the balance between them; and it is admitted that if no payments had been made to the petitioning creditor, after the act of bankruptcy, that his debt would have been sufficient. A case has been cited from the Term Reports, (*a*) from whence it has been argued, the creditor ought to have avowed that he held the money so paid for the assignees. Supposing the case cited to bear that construction, it would not apply here, for I think

(*a*) *Mann v. Shepherd*, 6 T. R. 79.

the circumstance of the creditor's issuing the commission is a disaffirmance of his right to retain the payment against the assignees. But then the court will tell him, As you did not, till the order of reference was made, avow that you held the money for the use of the assignees, you shall be answerable for the consequences of that concealment. I shall therefore support the commission, but the petitioning creditor must pay to the assignees what he has received from the bankrupts since the act of bankruptcy, and also the costs of the petition and of the inquiry; and if he do not within a fortnight, then the commission shall be superseded with costs.

1818.

Ex parte
MILLER &
BATE.

Ex parte
BENNETT.
—In the
Matter of
GARLAND
and others.

Mr. *Hart* and Mr. *Wingfield* for the assignees.

Mr. *Cullen* for the petitioning creditor.

Ex parte MAC MILLAN.—In the Matter of
SOWERBY.

MIC. TERM,
1818.

THE commissioners had allowed *Laing*, one of the assignees, to prove a debt for £.236. This was a petition by the other assignee to expunge the proof. *Laing*, in his examination before the commissioners, deposed, "that the bankrupt was, at and before the date and issuing forth of the said commission, and still is justly and truly indebted unto this deponent in the sum of £.236 for four tons of hemp sold and delivered by this deponent to one *George Scurrah*, the payment of which was guaranteed by the said bankrupt, for which said sum of £.236,

If a surety become bankrupt, the creditor cannot under the 49 Geo. 3. c. 121. s. 8. prove the debt, if it became due after the bankruptcy.

1818. " or any part thereof, this deponent hath not, nor
 — *Ex parte* " hath any person by his order to this deponent's
 M'MILLAN, " knowledge or belief, for his use, received any
 — In the " security or satisfaction whatsoever, save and ex-
 Matter of " cept the said guarantee, and the undermentioned
 SOWERBY, " bill of exchange bill, dated 24 June 1815, drawn
 " by deponent, accepted by *Trenholm Scurrah*, for
 " the sum of £. 236, and payable to deponent's
 " order four months after date." It appeared that
Laing had sold to *Scurrah* four tons of hemp, to be
 paid for by a bill, to be drawn by *Laing* upon and
 accepted by *Scurrah*, and also upon having the price
 of the hemp secured by the written guarantee of
 the bankrupt, which was accordingly given in the
 following words:

" Mr. J. *Laing*, Sir,

" At the request of Mr. *Geo. Scurrah*, we now
 " guarantee the payment of four tons of hemp
 " which he has purchased from you the 21st
 " inst.

" We are, Sir,

" Your obedient Servants,

" *James William Sowerby* and Co.

" 12, Fish Street Hill, 23d June 1815."

When the bill became due *Scurrah* had absconded,
 and the bill was dishonored.

The commission issued 20th October 1815.

The LORD CHANCELLOR,

There is no question as to *Scurrah's* debt. It is
 admitted that the goods were sold to him, and the
 debt so contracted still remains due. But it has
 been argued on several grounds, that *Laing* had not

a cause of action against the bankrupt, when the commission issued. It was said that he had received a parcel of goods in lieu of the guarantee, but I am not prepared to say, as the facts appear upon the affidavits, that such was the nature of the transaction. Then it is insisted, as this was an engagement to pay for goods already delivered to another, that such an engagement was merely voluntary, and would not support an action on the part of Mr. *Laing* against the guarantees. But the view I take of the case renders it unnecessary to enter into the discussion of that point, for the material question is, whether supposing this to have been a sufficient guarantee, a right of action had accrued to *Laing* before the bankruptcy. If he could have maintained an action, it must have been under the 49 Geo. 3. cap. 121; but I do not think that act applies to the present case. The eighth section of the act relates to the cases of principal and surety, but it does not provide for the relief of the creditor. [His Lordship here read the section of the act. (*a*)] Now if A. and B. are principal and surety, B. may, under this act, pay the debt and prove under A's commission, which before he could not have done. But in the present case, it is the surety and not the principal who has become bankrupt, and it is the creditor who applies to prove a debt that was not due at the time of the bankruptcy.

1818.

Ex parte
M' MILLAN.
—In the
Matter of
SOWERBY.

Proof expunged.

Mr. *Montagu* for the petition.

Mr. *Stephen* opposed it.

(a) 49 Geo. 3. c. 121. s. 8.

Mic. TERM, *Ex parte* CHATER.—In the Matter of CROSBY. (a)
1818.

It is in the discretion of the Lord Chancellor to permit or refuse a defendant at law to have copies of his examination before the commissioners. Upon this petition the examinations having been laid before the Lord Chancellor, he refused the application.

CHATER and **MILES** had been summoned before the commissioners, and examined from time to time touching the estate and effects of the bankrupt, which it was alledged they had improperly possessed themselves of. They were examined at six different meetings, and the commissioners had refused to permit them to keep memorandums of their examinations. *Chater* and *Miles* had not proved under the commission, nor claimed to be creditors. The assignees had lately brought an action of trover against *Chater* and *Miles*, and which then stood for trial. *Chater* and *Miles* applied to the assignees to furnish them with copies of their examinations, which the assignees refused. They then applied to the commissioners, who declined to interfere. *Chater* and *Miles* now petitioned, praying that the assignees might be directed to furnish them with copies of their examinations, and that in the meantime the action might be enjoined. The petition was supported by the affidavit of the petitioners and their solicitors, that they could not defend the action, nor instruct counsel for that purpose, without being furnished with copies of the examinations.

The Solicitor General and Mr. *Rose*, for the petitioners, argued, that it being intended to be used offensively against the parties not creditors, but ad-

(a) *Ex relatione.*

verse parties in an action, the petitioners were in fairness entitled to copies—that depositions were only private property of the commission when it touched the requisites to sustain the commission, viz. the act, trading and debt; but that here the depositions were in effect an answer to a bill of discovery, and of course ought to be attended with the same protection incident to the object of it.—

1818.

Ex parte
CHATER.
—In the
Matter of
CROSBY.

Mr. *Heald* and Mr. *Montagu* contra argued, that depositions were their private property; that the acts of Parliament gave no such privilege as that claimed by the petition. In *Boden v. Dellows* (b) such application was refused. So also in *Bracey's* case (c) the court of K. B. refused a similar application.

In reply, *Boden v. Dellows* was distinguished as being the ordinary case, in which the party applied for liberty to extend the time for answer until after being furnished with certain materials necessary for his answer, in possession of the plaintiff, within the principle of the *Princess of Wales v. Lord Liverpool*.

The LORD CHANCELLOR said, applications of this nature were properly made to the discretion of the Lord Chancellor, who, as the circumstances required, would either grant or withhold. In this case, his Lordship desired to have the examinations laid before him.

The next day, his Lordship said he had looked through the examinations, and also the affidavits, and taking both together, his Lordship thought the petition ought not to be granted; but as the point was new, he would not give costs.

(b) 1 Atk. 289.

(c) 1 Ld. Raymond, 153.

MIC. TERM, *Ex parte* ANSLEY.—In the Matter of **TICKELL,** '1818.

Where it is merely a question of convenience, it will be left to the assignee to choose whether mortgage accounts shall be taken before the commissioners or a master.

THIS was an application by a mortgagee for the usual order to have the estate sold, and to be permitted to prove for the difference, if the proceeds of the sale were insufficient to satisfy the whole debt; and the question was, whether the court should direct the accounts to be taken by the master, or by the commissioners.

The VICE CHANCELLOR.

My opinion is, in all these cases, where it is only a question of convenience, that the choice ought to be left with the assignees. Assignees undertake a voluntary and a laborious trust, and their convenience and predilections ought, in directing the inquiry, to be consulted, unless some sufficient reason be shewn to the contrary.

Mr. Hart, Mr. Horne, and Mr. Montagu, for the petitioner.

Mr. Cullen and Mr. Phillimore for the assignees.

Ex parte COLES.—In the Matter of COLES and GALPIN. MIC. TERM, 1818.

UPON this petition, it appeared that *Thomas Smith*, a creditor of *Coles* and *Galpin*, had presented his petition, stating the issuing of the commission against *Coles* and *Galpin*, and that *Coles* had duly surrendered himself, but *Galpin* had not, and was departed out of this country into foreign parts.—That on the day appointed for the second meeting, for the proof of debts and for the choice of assignees under the commission, divers persons were admitted to prove to the amount of £.44,000 and upwards in the whole, as the holders of certain bills of exchange, each and every of which bills purported to be drawn by one *James Taylor*, upon *Coles* and *Galpin*, payable to his own order, and to be accepted by *Galpin* for the firm.—That *Thomas Mower Keats* was admitted to prove, as the holder of certain of such bills, to the amount of £.5,050.—That *Richard Dixon* was also admitted to prove, as the holder of certain others of such bills of exchange, to the amount of £.1,800.—That all the other debts admitted to be proved at the meeting appearing to be debts bona fide incurred by the firm in the course of their business, amounted to the sum of £.778. 1s. 8d. and no more. *Dixon*, *Mills* and *Green* were at the meeting chosen assignees, by persons who were holders of such bills of exchange. Subsequently to the meeting, *Thomas Smith* discovered, that on or about the 3rd day of *December* 1817, *Galpin*, without the knowledge of his partner, ap-

Upon a petition to expunge the proofs upon certain bills of exchange, an action had been directed to be brought against the bankrupts, to try the validity of the debt. A material witness being abroad, the court of common law put off the trial. It was ordered upon petition, that the bankrupt should be at liberty to file a bill for a commission to take the examination of the witness abroad.

1818.

Ex parte
COLES.—In the
Matter of
COLES and
GALPIN.

plied to *John Kinnear*, by means of *Charles Barwell Coles*, the son of the said *Charles Coles*, to ascertain upon what terms *John Kinnear* would discount the acceptances of the firm of *Coles and Galpin*. And it was thereupon agreed by *Charles Barwell Coles*, as agent of *Galpin and John Kinnear*, that *Galpin* should cause divers bills of exchange, for such sums respectively and payable at such respective times as *John Kinnear* should specify, to be drawn upon and accepted by *Galpin* on behalf of the firm, to the amount of £.80,000 in the whole, and that *John Kinnear* should discount the same upon the terms of retaining to himself upwards of £.30 per cent. for his own use, and paying the remainder in goods and money. And in pursuance of this agreement, *John Kinnear* specified the several sums and times for and at which the said bills were to be drawn and made payable; and *Galpin* accordingly caused divers bills of exchange, for such sums and payable at such times respectively as *John Kinnear* had specified, to the amount of £.80,000 in the whole, to be drawn by a person of the name of *James Taylor*, payable to his own order, upon the firm; and *Galpin* accepted the same in writing for the firm.—After such bills were so drawn and accepted, *Charles Barwell Coles*, as the agent of *Francis Galpin and John Kinnear*, agreed that only part of the bills so drawn and accepted (that is to say, £.36,200), should be discounted by *John Kinnear*, and that *John Kinnear* should retain for his own use the sum of £.13,700 as the consideration for discounting the same, and deliver to *Galpin* as many goods, at cash prices, as with the sum of £.2,000 or £.3,000, to be advanced in money, would amount to £.22,500, being the remainder of the said sum of £.36,200; and *John Kinnear* refused to discount the bills upon any other terms. *Charles Barwell Coles*

accordingly delivered to *John Kinnear* so many of the bills as in the whole amounted to the sum of £.36,200; and thereupon *John Kinnear* delivered to *Francis Galpin* or to *Charles Barwell Coles* a large quantity of goods of the nominal value of £.20,000, but which were in reality of much less value; and he also paid to *Francis Galpin* or to *Charles Barwell Coles* the sum of £.2,500, making together the sum of £.22,500, and he retained the residue, being £.13,700, as the consideration for his discounting the bills. The bills of exchange proved under the commission by *Thomas Mower Keats* and *Richard Dixon* respectively, were part of the bills so delivered to *John Kinnear* and discounted by him. And after alledging that the bills were void for usury, and that the proofs of *Thomas Mower Keats* and *Richard Dixon* ought to be expunged, the petition prayed that the proofs of the several debts of £.5,050 and £.1,800, made by *Thomas Mower Keats* and *Richard Dixon* respectively, might be expunged. The petition came on to be heard before his Honor the Vice Chancellor, on the fourth day of *August* 1818, who was thereupon pleased to order, that the said two creditors, *Richard Dixon* and *Thomas Mower Keats*, should be at liberty to bring and prosecute such action or actions at law against the bankrupts, on the said bills, as they should be advised, and the said bankruptcy was not to be set up upon the trial of said action or actions. And the said *Thomas Smith* was to receive process against the said bankrupts, and to file common bail thereto, and to admit on the trial the signature of the said *James Taylor* as the drawer and indorser of the said bills; and the said action or actions, when so brought as aforesaid, were to be defended by the said *Thomas Smith*. In pursuance of the order, *Thomas Mower Keats* issued a writ

1818.

Ex parte
COLES.

—In the
Matter of
COLES and
GALPIN.

1818.

Ex parte
COLES.—In the
Matter of
COLES and
GALPIN.

against *Charles Coles* and *Francis Galpin*, to which an appearance had been entered; but no further proceedings had been taken in such action. *Richard Dixon* also commenced an action, pursuant to the order, against *Charles Coles* and *Francis Galpin*, in Michaelmas Term last, and *Thomas Smith* being desirous of not incurring any responsibility in defending the same, *Charles Coles* procured an indemnity to be given to the satisfaction of *Richard Dixon* and his solicitors, in respect of any costs which might be payable to him, and by his attorney appeared to the action and pleaded thereto, and issue and notice of trial was on the 30th day of *November* last delivered in such action for the adjourned sittings after last Michaelmas Term. The petition then stated that *Charles Barwell Coles* was a material and necessary witness for the petitioner in such action, and without whose evidence he could not safely proceed to a trial thereof.—That before and since the said action was commenced, various inquiries had been made by the petitioner's solicitor, to find out and discover the places of residence of *Charles Barwell Coles*, who quitted England in the month of *April* last, and they had since the service of the notice of trial discovered, that *Charles Barwell Coles* was at New York within the United States of America; and a direct communication had been opened with him for the purpose of inducing him to return to this country.—That under these circumstances, an application was made by summons, before one of the judges of the Court of King's Bench, to shew cause why the trial of the cause should not be put off till the sittings after next Hilary Term, and why a commission should not issue to take the examination of *Charles Barwell Coles*; and upon hearing the attornies on both sides, an order was made by one of the judges of the court, on

the 11th day of *December* instant (the plaintiff's solicitor refusing to consent to a commission), to put off the trial till the sittings after Hilary Term next, to give the petitioner an opportunity of procuring the evidence of *Charles Barwell Coles*, or of applying for relief to file a bill for the purpose of procuring a commission to take his examination.—That in as much as it was uncertain whether *Charles Barwell Coles* would return to this country, and as a commission could not be obtained at law without the consent of the plaintiff, the petitioner had been advised to file a bill in the High Court of Chancery for the purpose of obtaining such commission, but that it would be necessary to obtain an order to enable him so to do. The petition therefore prayed, that the petitioner might be at liberty to file one or more bill or bills in the High Court of Chancery, in such manner and form and against such parties as he should be advised, for the purpose of obtaining a commission to take the examinations of witnesses abroad, touching the matters therein before mentioned, and for a discovery and injunction in the mean time.

1818.

Ex parte
COLES.

—In the
Matter of
COLES and
GALPIN.

Mr. *Hart* and Mr. *Alcock* for the petition.

This application is rendered necessary by *Dixon's* refusing to consent to a commission going out to America, when the parties met before the judge of the Court of King's Bench. *Charles Barwell Coles* is the only person capable of giving evidence of the nature of the transactions between *Galpin* and *Kinnear*, and there is not any probability of his returning to this country, but without such probability being shewn, the court of law will not again postpone the trial; so that unless the prayer of this petition be granted, there

1818. can be no defence made to the action brought by
Dixon.

Ex parte
COLES.

—In the
Matter of
COLES and
GALPIN.

The Solicitor General and Mr. *Rose*, in opposition to the application, insisted upon the difference in the practice, as settled in the case of *Carstairs v. Stein (a)* between an issue and an action directed by the court. They said, where an action was ordered to be brought, it was the intention of the order to leave the parties to settle their legal rights by legal means, and to favor neither the one side nor the other by the interposition of any assistance peculiar to a court of equity. Besides, there was not any evidence that the witness intended to remain in America, and if he returned to England before the trial, the commission would be of no use, as the examination could not be read at the trial.

THE LORD CHANCELLOR.

I understand the petition to expunge the proofs was heard before the Vice Chancellor, who made the following order. (His Lordship read the order.) *Dixon* is to bring the action against the bankrupts, who are not to set up the bankruptcy. It is no doubt always the practice of this court, both in bankruptcy and in equity, when it sends the parties to the trial of an action at law, to place them in such a situation as though the action had originally commenced there. The jurisdiction assumed by courts of law with respect to the granting of commissions to examine witnesses, is of no very ancient date, and it is always competent for a party, notwithstanding such jurisdic-

(a) 2 Rose, B. C. 178.

tion, to file a bill for a commission to examine witnesses, which is a creature of this court. I will not say in this case that the bankrupt could not file such a bill, but it has been determined that he cannot file a bill for a discovery after an order in bankruptcy made for liberty to bring an action against him. (b) The point to be quite sure of, is, whether the case requires that a commission should issue. It is said the commission will be of no use if the witness return before the trial; but if no commission issue, that may be a reason why he should never return. I should wish to have an affidavit of the inducements held out to him to return, as the court must be sure that it is not practiced upon before it makes any order.

1818.

Ex parte
COLLS.
—In the
Matter of
COLLS and
GALPIN:

An order was subsequently made, that the bankrupt should be at liberty to file a bill. (c)

(b) See *Cooke v. Marsh*, 18 Ves. 209.

(c) On the subject of bills to examine witnesses abroad, see *Cock v. Donovan*, 3 Ves. & B. 76, and the cases collected in the note.

Courts of common law can only make an order to examine witnesses living abroad, on interrogatories, *de bene esse*, upon the consent of all parties: but they will do every thing in their power to make the parties consent, when necessary, as by putting off the

trial, at the instance of the defendant, if the plaintiff will not consent; and if the defendant refuse, the court will not give him judgment, as in case of a nonsuit. 2 Tidd. Prac. 853, 6th edit. and the cases there cited. But where a defendant had obtained time to plead on the usual terms, the court would not put off the trial to enable him to apply to a court of equity. *Calhoun v. Vaughan*, 1 Bos. & Pull. 210.

LINC. INN, *Ex parte* MONRO.—In the matter of FRAZER.
23 Jan. 1819.

Bond debt assigned by the obligee, and the bond delivered to the assignee, but notice of the assignment not given to the obligor previous to the bankruptcy of the obligee. Held that the debt remained in the ordering and disposition of the bankrupt, within the statute 21 Jac. 1. c. 19.

FRAZER the bankrupt being the obligee in a bond, and being indebted to *Monro* the petitioner, as a security for the debt, assigned to him, by writing, the bond debt, and also delivered the bond into his possession; but notice of the assignment of the bond debt was not given to the obligor. A commission of bankrupt subsequently issued against *Frazer*, and his assignees, under an arrangement with the petitioner, put the bond in suit in the Scotch courts against the obligor, who resided in Scotland, and recovered the amount of the debt secured by it. The petitioner claimed to be entitled to the money recovered by the assignees in liquidation of his debt, so far as it would extend, and to be allowed to prove the residue under the commission.

Mr. Blake for the petitioner.

The necessity of giving notice to the debtor of the assignment of a book debt, in order that it may be taken out of the operation of the statute of James, (*a*) must be admitted; but there is a material difference between bond debts and book debts. In the case of book debts, if notice of the assignment of the debt be not given to the debtor, the assignor, as between himself and the debtor, is apparently, both at law and in equity, entitled to the payment of the debt, and he may support an action for its recovery, against which the debtor has no defence. But a

(*a*) 21 Jac. 1. c. 19.

bond is the debt itself, and when the obligee not only assigns the debt but gives up the possession of the bond, he puts the debt altogether out of his own ordering and disposition, and incapacitates himself from maintaining an action against the obligee. There is not any decision to be found in the books in support of the proposition, that an assignment accompanied by the delivery of the bond does not completely divest the debt. All the authority in favour of that supposition, rests upon a dictum of Chief Baron *Parker*, in the case of *Ryall v. Rolle*; (a) and in that same case Mr. Justice *Burnet* noticing the effect of the statute, only insists that a delivery of the bond is necessary; and in *Jones v. Gibbons*, (b) Sir William *Grant* was clearly of opinion, that where a sum of money was secured by a bond and by a mortgage, that the debt passed to the assignee without notice of the assignment to the debtor. Lord *Hardwicke* himself stated, that many cases had occurred where the assignment of a bond, which had been delivered over to the assignee, had been supported against the assignees under the commission. (c) The present case is stronger in favour of the petitioner than any that have before occurred, as the delivery of the bond not only took the ordering and disposition of the debt out of the bankrupt, but at the same time put it completely in the power and possession of the assignee; for the court will recollect that there is this substantial difference between the Scotch and English laws, that by the former, the delivery of the bond is a complete legal transfer of the debt, and the assignee can imme-

1819.

Ex parte
MONRO.
—In the
Matter of
FRAZER.

(a) 1 Ves. 348.
(b) 9 Ves. 407.

(c) *Row v. Dawson*, 1 Ves.
331.

1818. diately put it in suit by his own authority alone; whereas by the laws of England, an assignment and delivery of the bond only gives the assignee an equitable interest in the debt.

Ex parte
MONRO.
—In the
Matter of
FRAZER.

This case comes very near that of *Jones v. Gibbons*, for the petitioner, after the assignment of the debt and delivery of the bond, might, without the assistance of the assignees, have made the debt a lien upon the obligor's real estate. Where a mortgage is assigned, he who has the estate has in effect the debt, and therefore it is not necessary to give notice to the debtor: so also here, though the estate itself is not transferred, yet the means and the instrument whereby the lien may be completed, are transferred and put into the possession of the assignee.

Mr. Hart, on the other side. It is necessary to give notice to the debtor for the purpose of taking the debt out of the ordering and disposition of the bankrupt, or otherwise the creditor might deal with the debtor, and thereby gain a fictitious credit, which it was the intention of the statute to discourage. What is stated to be the law in Scotland, is also that of Jamaica. But was it ever heard that, because a debtor happened to have Jamaica property, it therefore became unnecessary to give him notice of the assignment of the debt?

THE VICE CHANCELLOR.

In the case of *Jones v. Gibbons*, the mortgaged estate was well vested in the assignee, subject to redemption on payment of the debt; and the Master of the Rolls considered, that the estate could not vest in one person, and the right to receive the debt remain in another. The right to receive the debt is in-

accident to the mortgaged estate, and necessarily passes by the assignment of it. But the petitioner has failed in shewing that the assignment gave him a lien upon any land situated in Scotland, the property of the debtor: if he could have made out a case of that sort, perhaps by analogy to the cases of equitable deposit, he might have succeeded. The question is altogether unconnected with real property, and I therefore shall not think it necessary to direct any inquiry as to whether the obligee had any real estate in Scotland or not. The single question for me to determine is, whether the bond debt, after the delivery of the bond, was left in the ordering and disposition of the bankrupt. I admit there is a great difference between bond and book debts. A book debt cannot be the subject of an actual delivery, as for some purposes a bond debt may; and so it has been determined where a bond was the subject of a *donatio mortis causa*. There the delivery of the bond passed the debt. But in this case, did the delivery of the bond by the bankrupt take away his power to receive the debt, and if the obligee had bona fide paid the debt to the bankrupt, could the petitioner have called upon him to repay it? Certainly not; and if an action had been brought on the bond against the obligor, he might have discharged it by way of set off, in respect of any dealings with the bankrupt, without notice of the assignment. In the case of mortgages, this court also acts upon that rule, (*d*) and unless the mortgagee has notice, it will not permit the assignee to claim any thing under the assignment, but what is actually due between the

1818.

Ex parte
MONRO.—In the
Matter of
FRAZER.

(*d*) *Chambers v. Goldwin*, 9 Ves. 254, confirming *Matthew Walwyn*, 4 Ves. 118.

1818, mortgagee. I find the practice of the commissioners has been conformable to the rule stated in *Ryall v. Rolle*. The absence of any decision to the contrary, since the time of Lord *Hardwicke*, shews that rule to have been acquiesced in, and I think rightly, for the obligee, where notice is not given, may obtain payment of the debt, which is sufficient to leave it in his ordering and disposition within the meaning of the statute. (e)

22 Jan. 1819. *Ex parte BROCKSOPP*.—In the Matter of KENSINGTON.

Creditors who wish to have the accounts of the assignees taken, must first apply to the commissioners for that purpose; and if they miscarry in their judgment or refuse to act, the creditors may then petition the court to have the accounts taken.

THIS was a petition to have the accounts of the assignees taken. It appeared that a meeting of the commissioners had been called, for the purpose of investigating the accounts, and at this meeting the commissioners were satisfied with the accounts then produced; but the petition, supported by affidavits, stated, that by evidence which had been discovered subsequent to the meeting, the statement made before the commissioners was incorrect.

The VICE CHANCELLOR.

By this petition, it appears that the assignees furnished the commissioners with certain statements of account, which subsequently have been discovered

(e) 21 Jac. 1. c. 19. s. 10, 11. of the statute collected ante, 152.
See the cases upon these sections (n.a.)

to be incorrect. The single question is, whether, in the first instance, the creditors are to come here without having called upon the commissioners to correct the accounts of the assignees upon the new matter discovered. When creditors are dissatisfied with the commissioners, they may come to this court, and have their judgment set right, in case they have miscarried; but here it is admitted that there has not been any meeting since the discovery of the new evidence. As it is however stated at the bar that applications have been made to the commissioners, who have refused to call a meeting, I will let the petition stand over, that an affidavit may be made as to that fact.

1819.

Ex parte
BROCKSOPP.
—In the
Matter of
KENSINGTON.

Mr. Cullen for the petition.

Mr. Hart and Mr. Wilson contra.

Ex parte TIMBREL.—In the Matter of BROWN. 22 Jan. 1819.

A QUESTION, as to the jurisdiction of the court, arose upon this petition. The petition presented by the assignees prayed, that certain monies received by a partnership firm should be declared to be part of the bankrupt's estate, and the property of the petitioners. The firm had proved a debt under the commission. One of the members of the firm had lately died. It was objected, on behalf of the respondents, that the decision of the court might influence the arrangements to be made with the representatives of the deceased

Where a creditor has proved a debt, and the assignees have a demand against him, which if determined in their favor would give them a lien upon the dividends, they may proceed by a petition in the bankruptcy to enforce that demand.

1819. partner, and that the assignees ought to have proceeded by action and not by petition.

Ex parte
TIMBREL.
—In the
Matter of
BROWN.

His Honor the VICE CHANCELLOR was of opinion that the respondents were brought within the jurisdiction, by having proved undisputed debts, in respect whereof they were entitled to receive a dividend, upon which the assignees would have a lien, if his judgment should be in favor of the demand made by this petition. He therefore permitted the petition to proceed.

Mr. *Heald* and Mr. *Ching* for the petition.

Mr. *Bell* and Mr. *Pepys* contra.

8 Feb. 1819. *Ex parte* WILSON.—In the Matter of NICHOLSON and BROWN.

It is a contempt of the great seal for a petitioning creditor to strike a docket at the instance of a solicitor who undertakes to prove the act of bankruptcy and to guarantee him against any expenses he may be put to by issuing the commission, and the court therefore will not, upon the petition of such a creditor, tax the solicitor's bill of costs.

THE case made by this petition was, that on the 10th day of June 1817, the petitioner discounted a bill of exchange for £.192. 10s. 6d. for *Nicholson* and *Brown*, and advanced other sums of money to them to a considerable amount. On the 13th day of August the bill was dishonoured, when the petitioner, by his attorney, caused *Nicholson* and *Brown* to be arrested for the recovery thereof. The sheriff's officer took them, upon such arrest, to the office of I. K. an attorney, who promised the officer to procure him a bail bond at a future day, and procured *Nicholson* and *Brown* to be liberated, and I. K. afterwards took the names of two gentlemen as bail to the sheriff's office, who afterwards signed such bond.—On the 22nd of Sept. 1817, I. K. sent to the petitioner, and

requested him immediately to come to his office; and the petitioner accordingly waited on I. K. by whom he was informed, that *Nicholson* had left England for America, and that the bail, in the petitioner's action against the said *Nicholson* and *Brown*, had procured a warrant of attorney from *Nicholson*, and that they intended to put it in force.—I. K. then stated, that he wished to be concerned as solicitor for the petitioner, in issuing a commission of bankruptcy against *Nicholson* and *Brown*, and thereby prevent the said warrant of attorney being levied. The petitioner then reminded I. K. as that he must be aware that A. B. was the petitioner's solicitor, and that A. B. had caused *Nicholson* and *Brown* so to be arrested, as the petitioner's attorney, and that the petitioner did not wish to strike a docket without consulting A. B. and also that it was by his advice he always acted, or words to that effect, and that A. B. was then out of town.—I. K. then represented that the matter was urgent, and that there could not be any risque to the petitioner, as he, I. K. would guarantee the petitioner against any expences of the commission, and would give the petitioner a guarantee in writing.—The petitioner replied to I. K. that there could be no necessity for a written guarantee, for the petitioner conceived there was proof sufficient. The petitioner then observed, "But how do I know that acts of bankruptcy have been committed?" Upon which I. K. then said, "Many acts have been committed."—The petitioner then inquiring whether I. K. was certain that *Brown* had committed an act of bankruptcy, I. K. assured the petitioner that *Brown* had committed many acts of bankruptcy, and that he was then in I. K.'s house to avoid his creditors, and also that the petitioner would run little or no risk in striking the docket, and that he, I. K. would

1819.

Ex parte
WILSON.

—In the
Matter of
NICHOLSON
& BROWN.

1819.

Ex parte
WILSON.—In the
Matter of
NICHOLSON
& BROWN.

cause acts of bankruptcy, by both *Nicholson* and *Brown*, to be duly proved.—Upon such guarantee, and under such representations, the petitioner consented to strike, and did strike a docket against *Nicholson* and *Brown*. After the docket was struck, and within the four days prescribed by the order, (a) I. K. again declared that he could prove acts of bankruptcy, and in consequence thereof and without any farther directions from the petitioner, I. K. ordered a joint commission of bankrupt to be sealed.—I. K. acted as solicitor in striking the docket, and in issuing the commission.—I. K. procured *Nicholson* to to pay him £.500. within a short time of his absconding.—That after the return of the petitioner's solicitor, A. B. to London, the petitioner, by the advice of some of the creditors, gave notice to I. K. not to take any further proceedings in the commission, as it was not the intention of the petitioner to employ him any further, and the petitioner desired I. K. forthwith to deliver to him the bill of costs under the commission, as the petitioner was advised he could not employ the said A. B. without first paying such costs.—On the 26th day of *Sept.* 1817, I. K. sent to petitioner his bill of costs unsigned, and demanded immediate payment thereof, and threatened to arrest the petitioner unless he immediately paid it, within three hours after the delivery thereof, and sent to the petitioner the following letter:

“ Sir,

“ Before I direct the officer to execute the
“ writ I issued this morning, I once more apply
“ to you for payment of the debt and costs as
“ under, which if not complied with this even-

(a) 29 December 1806.

" ing, I shall certainly give the officer his in-
" structions early to-morrow.

1819.

" Yours."

Ex parte
WILSON.
—In the
Matter of
NICHOLSON
& BROWN.

Immediately on the receipt of the bill of costs, and before 3 o'clock on that day, the petitioner tendered to I. K. the full amount thereof, but I. K. refused to accept the same, unless the petitioner would pay to him the further sum of £.1. 13s. for the costs of a writ which he alledged he had issued against the petitioner before or within 3 hours after the delivery of the bill.—That the said I. K. declared he had a lien upon the commission of bankrupt for his said bill of costs.—That on the 27th of *Sept.* the petitioner again tendered the amount of the bill to I. K. who accepted it, without any further demand. On the 3d day of *October* a commission of bankrupt was sealed against *Nicholson* and *Brown*, and I. K's name appearing as solicitor thereto, the secretary of bankrupts refused to deliver the same to the petitioner's solicitor; but upon proof of the payment of the bill of costs, the commission was delivered by the secretary to the petitioner.—On the 4th *Oct.* the petitioner caused the commissioners to be summoned, who proceeded to receive evidence of the petitioner's debt, and of the trading and partnership of *Nicholson* and *Brown*.—The petitioner caused the sister of *Nicholson*, and also both the servants of *Nicholson* and *Brown*, to be examined before the commissioners as to the supposed acts of bankruptcy.—I. K. and his clerk were summoned to attend such meeting, and I. K. refused to give the messenger the name of his clerk, but he informed the messenger that he would attend the commissioners forthwith.—Neither I. K. or his clerk did attend the meeting of the 4th of *October*; and the commissioners after having waited a

1819. considerable time for them, were obliged to adjourn.—

Ex parte
WILSON.

—In the
Matter of
NICHOLSON
& BROWN.

In consequence of the nonattendance of I. K. the petitioner caused the following letter to be delivered to him, viz.

Re *Nicholson and Brown*.

"Sir,

"In consequence of your sending for me, and undertaking to guarantee me all the expences as petitioning creditor under this commission, and on your having declared that both these persons had committed several acts of bankruptcy, you being their private solicitor, I hereby require you either forthwith to furnish me or my solicitor with the names of the witnesses, and the full particulars of these acts of bankruptcy, or that you refund me the sum of £.19. 16s. 10d. paid by me to you as solicitor to this commission, or in default thereof, I give you notice that I shall petition the Lord Chancellor on the subject, or take such other proceedings as may be advised,

Your's, &c."

9th October 1817.

On the delivery of such notice, I. K. said, he knew that acts of bankruptcy had been committed, and that if he had had the papers he could have opened the commission; but that he would not tell the secrets of his office, nor permit his clerk to tell them; and that he was a creditor, and would not attend the commissioners, or words to that effect. The petitioner being thus unable to prove the bankruptcy of *Brown*, caused a separate docket to be struck against *Nicholson*, in order to prevent a fictitious sale of the effects.—I. K. then declared to the messenger, that if the petitioner opened the

separate commission, he would soon be upon him with a new joint commission. On the 24th day of *October* 1817, a separate commission issued against *Nicholson*, upon the petition of the petitioner, under which he was duly declared bankrupt.—That on the 1st day of *November* 1817, I. K. caused the joint commission against *Nicholson* and *Brown*, which had been issued by him as the solicitor to the petitioner, to be superseded for neglect in want of prosecution, which neglect was solely occasioned by his own nonattendance and conduct.—And about the same time another commission was issued by I. K. against *Nicholson* and *Brown*, upon the petition of I. K. along with five other persons, which commission was superseded as being concerted and fraudulent.—That in the petition of the present petitioner, who thereby also prayed that I. K. might refund the sum paid to him by the petitioner, upon the hearing thereof, it was objected by the counsel for the respondents, and allowed by the court, that no order could be made directing I. K. to refund the said sum, or that his bill of costs should be taxed, because the petition was entitled in the matter of *Nicholson* and *Brown*'s second joint commission issued on the said 1st day of *November*, and that the prayer related to matters alone connected with the first joint commission issued on the 3rd day of *October*.—The petition prayed that I. K. might be ordered to refund the said sum, and that he might be ordered to pay the petitioner the costs of and occasioned by the meeting of the said commissioners on the 11th day of *October* to open the commission; or in case his Lordship should think the petitioner liable to pay the bill of costs or any part thereof, then that the same bill or such part thereof might be referred to a master in chancery for taxation, and that I. K. might produce

1810.

—
Ex parte
WILSON.
—In the
Matter of
NICHOLSON
& BROWN.

1819. before the master, upon oath, as the master should direct, all books, papers and writings in his custody or power relating to the said bill of costs, or any items or charges therein, and that I. K. and his clerk might be examined upon interrogatories touching the same and otherwise as the master should direct, and that I. K. might be ordered to pay the costs of and occasioned by this application and of such taxation, and that such several costs of the petitioner might be taxed in like manner as between solicitor and client in case the parties differed about the same; and that I. K. might be ordered to refund what he has been overpaid, &c.

Ex parte
WILSON.
—In the
Matter of
NICHOLSON
& BROWN.

After this petition had been opened, and previous to the discussion of the merits,

The VICE CHANCELLOR said,

The difficulty I here feel is, that this petition seeks to charge a solicitor in respect of his conduct in a transaction equally improper on the part of the petitioner and the solicitor. The petitioner states, that he agreed to strike a docket upon the representation made by the solicitor, and upon his proposed guarantee against all expenses. My opinion is, that if a petitioning creditor lend himself to a solicitor, and become his instrument, under a promise that he shall not be put to any expence, he acts in abuse of the great seal, and ought not to be heard to claim the assistance of the court in any matter arising out of such an agreement. (a)

(a) The authorities upon the law of maintenance are collected in *Hawkins's Pleas of the Crown*, B. 1. c. 83. With respect to how far acts of maintenance are justifiable in an attorney, he says,

Let the petition be dismissed without costs.

1819.

Mr. Agar and Mr. Montagu for the petition.

Ex parte
WILSON.

Mr. Hart and Mr. Beames for the respondent.

—In the
Matter of
NICHOLSON
& BROWN.

Ex parte PARKER.—In the Matter of PARKER.

HILARY
TERM,
1819.

A PETITION had been adjourned to the petition-day before Hilary Term, to give the parties an opportunity of trying a question in an action at law. The venue was changed, which made it necessary that a further adjournment of the petition should take place, till after the spring assizes. It appeared to have been mutually understood that the hearing of the petition

Bankrupt presenting an unnecessary petition, his solicitor ordered to pay 40s. costs.

“There is no doubt but that an attorney may lawfully prosecute or defend an action in the court wherein he is an allowed attorney, in the behalf of any one by whom he shall be specially retained, and that he may assist his client by laying out his own money for him, to be repaid again, and also may maintain an action against him for the same by virtue of such a retainer, without any special promise. And it is said also, that attorneys may justify such maintenance in other courts, wherein they are not allowed attorneys, but that they cannot have an action for the money so laid out, without a special promise, and that they are more justified by a general retainer to prosecute for another all his causes than if

they were not retained at all; and it is certain that they ought not to carry on a cause for another at their own expence, with a promise never to expect a repayment.”—In support of these propositions, he cites 13 H. 4. 16. Keilw. 50. Hob. 117. 2 Inst. 564. 2 R. Abr. 116. F. Main. 21. 3 Mod. 98. 2 Danv. 487. 12, 13, 14. Winch. 52. 1 Jon. 208. C. Car. 159. 194. C. Eliz. 415. 459. 760. Moor 366. 2 R. Abr. 114, 115. Whether an attorney's laying out money for his client be maintenance, see *Pierson v. Hughes*, 1 Freeman, 71. 81. and Co. Litt. ed. Har. & Butl. 3681. n. 319. The reader is also referred to what Mr. J. Buller said on the subject of maintenance, in *Master v. Miller*, 4 T. R. 340. and to Russell on Crimes, 266.

1819. should be further adjourned; and the bankrupt afterwards presented this petition praying to that effect.

Ex parte
PARKER.
—In the
Matter of
PARKER.

The only question was as to the costs.

The VICE CHANCELLOR.

This petition was quite unnecessary, the parties being agreed upon the adjournment. The circumstance of the trial having been put off till the next assizes, needed only to have been intimated to the court, and the hearing of the petition would have been postponed as of course. But instead of making this suggestion to the court, this expensive mode of proceeding has been resorted to. As the other party has been to blame in filing so long an affidavit in answer to the petition, I shall not give full costs; but as the bankrupt cannot be made to pay costs, I shall order that his solicitor pay to the respondents 40s. costs.

Mr. Montagu for the petition.

Mr. Agar for the respondent.

HIL. TERM,
1819.

Ex parte CORRY.—In the Matter of
MULLENS. (a)

Where an assignee had absconded, the bargain and sale ordered to be vacated from the date of the order.

IN this case a commission of bankrupt, bearing date the 28th day of *January* 1817, was awarded and issued against *William Mullens*, under which he was duly found and declared bankrupt. *William Osborne* and *James Wagg* were duly appointed assignees of the

(a) Ex relatione.

estate and effects, and an assignment of the personal estate, and a bargain and sale of the real estate, were in due manner made, by the major part of the commissioners in the said commission named, to them accordingly. *James Wagg*, in the month of *May* last, absconded from the place of his residence, and had not since been heard of, and was supposed to be in parts beyond the seas. A considerable part of the freehold and leasehold estates of the said bankrupt had been sold, but no conveyances or assignments thereof had been or could be executed to the respective purchasers, by reason of *James Wagg* having absconded. The petition was by a creditor under the commission, and it prayed that *James Wagg* might be discharged from being one of the assignees of the estate and effects of the said *William Mullens*, and that the assignment of the personal estate, and the bargain and sale of the real estate of the said bankrupt, so made as aforesaid to *William Osborne* and *James Wagg*, might be vacated, but without prejudice to any act done under the same, and that the commissioners under the commission against the said *William Mullens*, should cause a meeting of his creditors to be had to proceed to the choice of one or more assignee or assignees of the estate and effects of the said bankrupt, in the room of the said *James Wagg*, and that the commissioners might, upon the choice of a person or persons to be an assignee or assignees in the room of the said *James Wagg* as aforesaid, execute to the said *William Osborne* and to such person or persons so to be chosen as aforesaid, an assignment of the personal estate, and a bargain and sale of the real estate of the said bankrupt.

1819.

Ex parte
CORRY.

—In the
Matter of
MULLENS.

Mr. *Glyn* for the petitioner.

1819.

Ex parte
CORRY.
—In the
Matter of
MULLENS.

The VICE CHANCELLOR. (*a*)

The authority given to the great seal to vacate the assignment of the bankrupt's estate is in a great degree nugatory, unless it include the bargain and sale. I will however speak to the Lord Chancellor upon the subject.

This petition was mentioned again.

LINC. INN,
April 8th,
1819.

The VICE CHANCELLOR. (*a*)

The Lord Chancellor concurs in the opinion, that the authority to vacate the assignment of the bankrupt's estate includes the bargain and sale, and that the great seal has power to vacate the bargain and sale from the date of its order, leaving unaffected all prior acts of disposition of the bankrupt's estate. He has suggested that it may be worth considering whether an express clause to that effect may not be properly introduced into the bill now pending in parliament, for the amendment of the bankrupt laws.—Take the order, that the bargain and sale be vacated from the date of the order.

The following order was drawn up. (*b*)

Now upon hearing the said petition read, &c. I do order, that a meeting of the commissioners named in the said commission, or the major part of them, be forthwith called, of which due notice is to be given and published in the *London Gazette*, and that the said *James Wagg* be discharged and removed

(*a*) Ex relatione.

the matter of *Goodchild*, in the

(*b*) See ex parte *Cook*, the next case; and also the case in

foot note to ex parte *Cook*.

from being an assignee of the estate and effects of the said *William Mullens*, and that the assignment of the personal estate of the said bankrupt, *William Mullens*, so made as aforesaid, be and the same is hereby vacated. And I do order, that the bargain and sale of the said bankrupt's real estates, and the enrolment thereof, be and the same is hereby vacated from the date of this my order, so far as it relates to property undisposed of, without prejudice to any thing done under the same: and I do order, that the said commissioners do proceed to the choice of one or more person or persons to be an assignee or assignees of the estate and effects of the said *William Mullens*, in the room and stead of the said *James Wagg*; and the creditors of the said *William Mullens* who shall be present at such meeting are to proceed to such choice accordingly: and I do order, that after such choice be made, the said commissioners do forthwith execute a new assignment of the said bankrupt's personal estate, and a new bargain and sale of the said bankrupt's real estates undisposed of, to the said *William Osborne* and such other person or persons as shall be chosen assignee or assignees as aforesaid: and I do order, that the said *James Wagg* do come to an account before the said commissioners for the estate and effects of the said *William Mullens* come to the hands of the said *James Wagg*, or to the hands of any other person or persons by his order or for his use; and for the better taking the said account, the said *James Wagg* and all other proper parties are to be severally examined before the said commissioners, upon interrogatories or otherwise, touching the matter in question, as the said commissioners shall think fit, and are to produce before them, upon oath, all books of account, papers and writings in their respective custody or power, relating thereto, as the said

1819.

Ex parte
Corry. .
—In the
Matter of
MULLENS.

1819.

Ex parte
Corry.

—In the
Matter of
MULLENS.

commissioners shall direct: and I do order, that the said *James Wagg* do pay to the said *William Osborne* and to the person or persons who shall be chosen the new assignee or assignees as aforesaid, the balance which upon taking the said account shall be found due from him to the estate of the said *William Mullens*, and do deliver over to the said *William Osborne* and to the said new assignee or assignees so to be chosen, all such part and effects of the said *William Mullens* as upon taking the said account shall appear to have come to the hands of the said *James Wagg*, and to be remaining in specie and undisposed of, together with all books of account, papers and writings in his hands or in the hands of any other person or persons by his order or for his use, belonging or in any wise relating to the said *William Mullens*, his estate and effects: and I do further order, that the costs of the meeting of the said commissioners for the choice of a new assignee or assignees, as before directed, the costs of taking the said account, as also before directed, together with the costs of and occasioned by the present application to me, be paid and borne out of the estate and effects of the said *William Mullens*, such respective costs to be settled by the said commissioners, in case the parties shall differ about the same.

Ex parte COOK.—In the Matter of WATKINS
and LEDGER. (a)

12th Jan.
1807.

THIS was the petition of *Thomas Cook*, a creditor, on behalf of himself and the other creditors of the said bankrupts, stating (*inter alia*), that on or about the 14th *November* 1795, a joint commission issued against said bankrupt.—That *Samuel Wilmot Hodgetts*, *John Hopkins*, *William Cooke*, and *James Rudge Lamb*, were duly appointed assignees.—That the real and personal estate and effects of the bankrupts were, by indentures of bargain and sale duly enrolled, bearing date the 9th *December* 1795, conveyed and assigned to the said assignees.—That the said *William Cooke*, one of the assignees, died in 1796.—That the said *James Rudge Lamb*, one other of the said assignees, in 1797 was declared a bankrupt, and absconded, and never appeared to his commission.—That on the 6th of *April* 1797, a meeting was held for the choice of an assignee or assignees in the place and stead of the said two last-named assignees.—That *Richard Adcock* was chosen in their place.—That the real and personal estate and effects of the said bankrupts were, by indentures of assignment bearing date on or about the 21st day of *March* 1798, and made between the said *Samuel Wilmot Hodgetts* and the said *John Hopkins*, (two of the assignees originally chosen) *Francis Welles*, (sole assignee of the said

(a) From the secretary's book. The order in *ex parte Lemon* was
See the argument and judgment not drawn up.
in the case reported 13 Ves. 271.

1807. *James Rudge Lamb*) and the major part of the commissioners, conveyed and assigned to *David Caddell*, in trust to reassign and by him the said *David Caddell*, reassigned to the said *Samuel Wilmot Hodgetts*, *John Hopkins*, and *Richard Adcock*; and by indentures of lease and release dated respectively the 20th and 21st day of *March* 1798, from the said *Samuel Wilmot Hodgetts* and the said *John Hopkins* and *Francis Willes* and the major part of the commissioners named under the said commission against the said bankrupts, to the said *Richard Adcock*, duly vested in the said *Samuel Wilmot Hodgetts*, and the said *John Hopkins* and *Richard Adcock*.—That in *February* 1801 the said *Richard Adcock* absconded from his residence in debt, and had not since been heard of, and supposed to have gone abroad.—That the said *John Hopkins* died in 1802.—That the said *Samuel Wilmot Hodgetts* was then the only acting assignee of the said bankrupts.—That there was certain real estate of the bankrupt, *Henry Ledger*, then remaining unsold, which the petitioner and the other creditors were desirous should be sold; that so long as the said *Richard Adcock* continued an assignee, the said *Samuel Wilmot Hodgetts* could not make a title to a purchaser without the said *Richard Adcock's* joining.—That there was also personal estate of bankrupt *Ledger's* uncollected.—That the said *Hodgetts*, *Hopkins* and *Adcock*, as assignees, had sold certain parts of the real estate of the said *Henry Ledger* to *Thomas Onions* and *James Mallen*, who were then in the possession thereof.—That no other part of the real estate of the said bankrupts had been sold by the assignees.—The petition prayed that the said *Richard Adcock* might be discharged from being an assignee, and a new choice had, and that the bargain and sale from the commissioners to the four assignees originally chosen,

Ex parte
COOK.
—In the
Matter of
WATKINS
and
LEDGER.

and the indentures of assignment of 21st of *March* 1798 to the said *David Caddell*, and the said indentures of lease and release of the 20th and 21st *March* 1798, might be vacated and cancelled, and the commissioners execute a new assignment and bargain and sale to the said *Hodgetts* and such new assignee, and said *Hodgetts* and new assignee convey and confirm such part of the real estate of the said bankrupts as had been sold, at the expence of the bankrupts' estate.

12th *January* 1807.

Now upon hearing the said petition read, and what was alledged by the counsel for the petitioner, and also for *Thomas Onions*, of the parish of *Dudley* in the county of *Worcester*, mercer, and *James Mallen* of the same place, farmer, two of the purchasers of part of the estate of the said bankrupts; and it appearing that the former assignees chosen under this commission had made sale of part of the said bankrupts' real estate unto the said *Thomas Onions* and *James Mallen*—I do hereby confirm such sales to the said purchasers, and such sales hereby stand confirmed to them accordingly: and as to the other part of the said bankrupts' estate remaining unsold, I do hereby vacate the several bargain and sales and assignments already executed by the commissioners acting in this commission of bankrupt to the said assignees, and they are hereby severally and respectively vacated accordingly.—And I do order, that the said *Richard Adcock* be discharged from being an assignee of the estate and effects of the said bankrupts, and let a new choice of assignees be had, and let the said commissioners execute a new bargain and sale and an assignment of the said bankrupts' estate and effects

1807.

Ex parte
Cook.

—In the
Matter of
WATKINS
and
LEDGER.

1807. remaining unsold, to the said *Samuel Wilmot Hodgetts*, and to such new assignee or assignees, so to be chosen as aforesaid, and let the costs of the application, and all other costs occasioned thereby, and also the costs of the purchasers of the estate of the said bankrupts already sold, be paid out of the said bankrupts' estate, to be settled by the said commissioners, in case the parties differ about the same. (a)

Ex parte
COOK.

—In the
Matter of
WATKINS
and
LEDGER.

(a) It appears from the report in 13 Ves. that Lord Erskine made this order upon the authority of *ex parte Bainbridge*, 6 Ves. 451. In that case all the assignees were dead, and the heir of the survivor was an infant. The order in *ex parte Bury* was produced as an authority for vacating the bargain and sale, but the Lord Chancellor said, "that was a case of a provisional assignee, which makes all the difference; for the full assignment divests his estate, but nothing can take it out of this infant heir of the surviving assignee." The Lord Chancellor, it seems, afterwards thought it might be done, the act giving the authority. But upon searching the secretary's books, it does not appear that the order was drawn up.

Subsequently, 10th December 1817, upon a petition in the matter of *Goodchild*, the question as to vacating the bargain and sale was again agitated. According to my note, the petition was by two of three assignees, that the other, who had become imbecile, might be removed, and a new one chosen; that the old bargain and sale might be vacated and a new one executed. The real estate was very considerable, and there were contracts for sales to a large amount. Conveyances had been executed to some of the purchasers.

Mr. Hart, on behalf of such purchasers, contended, that the bargain and sale ought only to be vacated so far as it related to that part of the estates which had not been actually conveyed.

The LORD CHANCELLOR.—I cannot vacate it partially, it must be either vacated altogether or not at all. But I have no idea that vacating the bargain and sale would disturb the conveyances actually executed.

Mr. Hart then requested his Lordship to direct that, after the new bargain and sale was made, the assignees might execute conveyances to his clients.

The LORD CHANCELLOR.—I have no objection to do that, but it must be at their expense, unless you can shew it is necessary to their title.

11th December 1817.—

Mr. Hart. This is a question of great importance to the purchasers, as the estates sold amount to between sixty and seventy thousand pounds, and they are advised that the 5th Geo. 2. c. 30. s. 31. only relates to the assignment, and not to the bargain and sale; and such seems to have been your Lordship's opinion, in *ex parte Bainbridge*, 6 Ves. 451.

Mr. Montagu for the petition.—

The prayer of this petition is founded upon that in *ex parte Leman*, 13 Ves. 271. and the only question is, whether the word as-

Ex parte GREENWOOD.—In the Matter of **HIL TERM,**
FELTON. 1819.

A COMMISSION of bankrupt issued against *Robert Felton*, hop and seed merchant, under which he was duly found and declared a bankrupt.—The second meeting for the choice of assigness under the commission was appointed to be held on the 17th day

Where debts were secured by a deposit of hops, the court directed a value to be set upon them, according to the market price of the day of the choice of assignees, and permitted the creditors to prove for the difference between the price so fixed and the debts secured, and to vote in the choice of assignees.

assignment in the statute includes a bargain and sale. In practice conveyancers have always acted upon the statutes of Henry 8th and James 1st; but I submit to your Lordship that you have the power partially to vacate the bargain and sale.

The LORD CHANCELLOR.—By the 26th section of the statute 5 Geo. 2. c. 30. it is enacted, that the commissioners or the major part of them authorized, shall assign every such bankrupt's estate and effects unto such person or persons as the major part of in value of such creditors, according to the several debts then proved, shall choose as aforesaid. If the acts of parliament had not contained special directions as to the modes by which the assignment of the estate was to be made, the personal estate might have been assigned to the assignees by a common assignment, and the real estate by any conveyance sufficient in law for that purpose. The statutes require the real estate to be conveyed by deed indented, and inrolled within six months after the making thereof. The practice has always been for the

commissioners to do it by bargain and sale; but I suppose any sufficient conveyance by deed indented would do. (His Lordship here read the 31st section of the 5th Geo. 2. c. 30.) The ordinary mode certainly has been for the commissioners to execute one assignment of the personal estate and another of the real estate, by bargain and sale; but if they convey by bargain and sale to another, the bargainee is their assignee. I think the new assignment was only to be of the estate remaining undisposed of and actually in the assignees, and that it cannot affect the estates conveyed to purchasers. In the ordinary case, the court directs the old assignees to join, but that does not appear to be necessary.

The petition stood over to be again spoken to, but I cannot find that it was afterwards mentioned. The books in the office have been searched, but no such order as that suggested by Mr. Hart appears to have been made; so it seems probable that the purchasers acquiesced in the opinion thrown out by the Lord Chancellor.

1819. of *September* instant.—The petition stated that the debts of the petitioners and other creditors of *Robert Felton* were partly in respect of loans of cash made by them to him upon security of hops deposited with them, and that the present value of the hops was much less than the debts so secured upon them, and that therefore the petitioners and such other creditors would be creditors of *Robert Felton* for the residue of their debts, beyond the value of the hops, and they were desirous of proving under the commission for the purpose of voting in the choice of assignees; but if the proofs were to be delayed until after the hops should have been sold, and the residue of their debts beyond the proceeds of the sales ascertained, such purpose would be defeated.—It was therefore prayed, that the value of the hops might be taken at the market price of hops on the day of the choice of assignees, and be deducted from the amount of the debts, and that the petitioners and the other creditors might be permitted to prove for the residue of their said debts, after making such a deduction, and that if the sale of the hops should produce more than the amount of the value thereof so taken and ascertained as aforesaid, the same might be carried to the estate, or that the commissioners might be directed to act as they in their discretion should think fit, under the circumstances above stated.

Ex parte
GREENWOOD.
—In the
Matter of
FELTON.

Mr. *Rose*, in support of the petition, produced an order made by the Lord Chancellor in a case similarly circumstanced, whereupon the Vice Chancellor directed that precedent to be pursued in drawing up the order. (*a*)

(*a*) *Ex relatione.*

The following order was made.

1819.

Ex parte
GREENWOOD.
—In the
Matter of
FELTON.

Let the commissioners, at the expence of the petitioners respectively, and such other creditors respectively as may seek to have the benefit of this order, so far as such expence is occasioned by inquiry with regard to their respective debts, inquire whether the petitioners respectively or such other creditors respectively are creditors in respect of any and what sums duly and lawfully secured by the deposit of hops. And with respect to the petitioners and such other persons respectively, whom the commissioners shall find to be such creditors, let a value be set upon such deposited hops respectively, according to the market price of the day of the choice of assignees.—And upon the petitioners respectively, and such other creditors respectively undertaking that in case the hops, duly and lawfully deposited with them respectively, shall be sold for more than the value so set upon them, the excess of the produce of such sales respectively shall be carried to the account of the estate for the general benefit of the creditors, let the petitioners respectively and such other creditors respectively prove, upon the day of the choice of assignees, for the difference in amount between the value so set and that of the sums so secured, and vote in the choice of assignees, as creditors for that difference.—But this order is to be without prejudice to any order hereafter to be made upon any petition or petitions of any creditor or creditors, or of the assignees chosen or any other of them who may be dissatisfied with the judgment of the commissioners upon such inquiry as aforesaid, and without prejudice to the consideration by whom any costs, charges, or expences occasioned by this order or any proceedings under it are to be paid and borne, in case any such

1810.

Ex parte

GREENWOOD.

—In the
Matter of
FELTON.

petition or petitions shall be presented and relief be thereupon ordered, and to the consideration of the costs of such petition or petitions.—And no creditor is to have the benefit of this order before the commissioners, unless such creditor shall undertake before the commissioners, that in case, upon any such petition or petitions being presented, such creditor shall not be held to be entitled to the hops deposited or alleged to be deposited with such creditor by way of security for his debt or debts, he will submit to such order for delivering up the hops so deposited, or accounting for the value thereof for the benefit of the bankrupt's estate, as the court may think proper to make upon the hearing of such petition or petitions.

LINC. INN, *Ex parte* WARWICK.—In the Matter of HAUGH.
1 Apr. 1819.

Petition by the lessor of a bankrupt lessee for payment of rent due after the bankruptcy, and for a compensation for hay and straw sold and carried off the premises by the assignees, dismissed on the ground that the court had not jurisdiction, except in cases under the statute 49 Geo. 3. c. 121. s. 19, or where the petitioner made a case for an injunction.

THE petitioner, in the month of August 1810, agreed with the bankrupt to let to him a farm with the appurtenances for the term of 8 years, from the 5th of April then last past, at the yearly rent of £.364 15s. and thereupon an indenture of lease bearing date the 14th of August 1810, was made and executed by and between the petitioner of the one part, and the bankrupt of the other part; whereby, in consideration of the yearly rent, covenants and agreements thereafter reserved and contained, and on the part and behalf of the bankrupt, his executors, &c. the petitioner demised unto the bankrupt, his executors and administrators, the said farm, consisting of, &c. To hold the same from the 5th day of April

then last past, for the term of 8 years then next ensuing, paying therefore unto the petitioner, his heirs and assigns, the yearly rent of £.364 15s. by two half yearly payments, to be made on the 5th *October* and 5th of *April*; and the bankrupt covenanted to pay the rent, and to keep the premises in repair; and also that he would, in a good husband-like manner, eat out, spend, spread and bestow upon the lands thereby demised, all hay, straw, fodder, soil, dung, manure, compost and ashes, which should from time to time arise and be made upon the said demised premises up to the time of putting in the crop in the last year of the term; and should and would eat, consume and convert into manure, a fair proportionable quantity of the straw, hay, and fodder, arising from the last year's crop, in the outhouses and farm-yard belonging to the premises, and not elsewhere: and in order the more effectually so to do, would keep up his or their full usual or average stock of horses and cattle, and feed or fother the same in the outhouses and farm-yard during the last autumn, winter and spring, up to the end of the term, and should and would leave in the said farm-yard, for the use of the petitioner, his heirs and assigns, all the dung and manure so to be made from the said last year's crop, and all the ashes, soil, or rackings made or arising upon or from the said premises, after putting in the same crop or otherwise remaining thereon, and would not take or carry away from off the said premises any dung, manure, hay or straw, except only such hay or straw as might remain uneaten at the end of the term. And it was thereby provided and mutually covenanted by and between the said parties, that the bankrupt, his executors or administrators, except in the last year of the said term, might sell and carry off any hay or straw, bringing back and laying upon the lands thereby demised two

1819.

Ex parte
WARWICK.
—In the
Matter of
HAUGH.

1819. loads of good rotten cow or horse dung for each cart load of hay or straw sold and carried off in the same year, proof of the quantity being made by the bankrupt, his executors or administrators; and that the petitioner should abate or allow out of the last half year's rent, at the end of the term, to the bankrupt, at the rate of £.3 3s. for each acre of well-managed turnip land and fallow which should, in regular course, be in such cultivation in the last year of the term, the petitioner, his heirs and assigns having liberty to enter upon the fallow land in the month of *September*, and to take any manure then upon the farm, to lay thereon and to sow the same with winter grain, and to enter upon the turnip land as soon as the turnips should be off the ground.

Ex parte
WARWICK.
—In the
Matter of
HAUGH.

The bankrupt continued in the occupation of the farm and premises, as the tenant thereof, under and by virtue of the said indenture of lease, from the day of the date thereof down to the 3rd day of *February* 1816. On the 23rd of January 1816, a commission of bankrupt issued against him, under which he was duly found and declared a bankrupt, and assignees were chosen of his estate and effects, and the usual assignment thereof was made to them. The assignees took possession of all the cattle, hay, straw, corn, and other produce, stock and effects, belonging to the bankrupt upon the farm and premises, and in *March* 1816 they caused all the cattle belonging to the bankrupt, which they had previously removed from another farm of the bankrupt's, to be sold, and they also sold and carried off all the hay and straw upon the farm and premises, and let a crop of turnips growing upon part of the premises, to be eat off by sheep, at a certain weekly rent; and the crop of turnips was eat off by sheep, and the sheep were removed from off the

farm and premises previous to the 5th day of *April* 1816; and the assignees paid the poors' rates, and the tenant's share of the county rates, and also the landlord's and tenant's property tax charged upon the farm and premises during the time they continued in the occupation of the farm and premises, and subsequent to the 5th of *April* 1816. Half-a-year's rent for the farm had become due on the 5th of *April* 1816, and the petitioner on that day caused applications to be made to the assignees to pay the same, but the assignees declined at that time to pay it, until they had advised with their solicitor. The petitioner on the 20th of *April* 1816, again caused applications to be made to them, to pay the half-a-year's rent, and also to deliver up to the petitioner the possession of the farm and lands, and the assignees, although they at that time declined to pay the rent, yet they caused the possession of the farm and lands to be delivered up to the petitioner. The assignees also caused all the straw and hay upon the farm and premises to be sold and carried away, but they never caused any dung to be brought back and laid upon the farm and premises in the place thereof, although applications were made to them for that purpose, according to the proviso contained in the indenture of lease.

1819.

Ex parte
WARWICK.
—In the
Matter of
HAUGH.

The petition, after stating the above facts, prayed, that the assignees might be ordered to pay to the petitioner the half year's rent due for the farm and premises on the 5th day of *April* 1816, and also a compensation for the hay and straw sold and carried off the farm and premises by them, without bringing back dung for the same, as was mentioned in the indenture of lease, and that all proper and usual directions might be given for ascertaining the amount of such compensation; and in case his lordship should

1819.

Ex parte
WARWICK.
—In the
Matter of
HAUGH.

be of opinion that the petitioner was not entitled to have the half year's rent paid to him, then that the petitioner might be declared entitled to prove the same as a debt under the commission, and to receive dividends thereon with the other creditors of the bankrupt, and that all proper directions might be given for that purpose, and that the assignees might pay the costs of this application, &c. &c.

Upon the opening of this petition, the Vice Chancellor expressed his doubts as to the jurisdiction of the court to give the relief prayed, and he desired the counsel for the petitioner to speak to that point.

Mr. *Heald* and Mr. Cooper relied upon *ex parte Nixon (a)* and *ex parte Whittington. (b)*

Mr. *Bell*, for the assignees, contended, that the case cited did not apply to the present petition, as it did not pray an injunction.

THE VICE CHANCELLOR.

As a general rule, this court sitting in bankruptcy has only jurisdiction in disputes between the assignees and those who have come in under the commission relative to the bankrupt's estate. But this rule is not without exceptions. The subject was much agitated in the cases of short bills, and it was there determined in favor of the jurisdiction. Injunction cases seem also to form another exception to the rule, and where a petition has made out a case of waste, and prayed an order in the nature of an injunction to restrain waste, the court has entertained it. It is perhaps

(a) 1 Rose, B. C. 445.

(b) *Ante*, 87.

difficult to find upon what principle the court first granted injunctions upon petition in bankruptcy; but the practice being established, there is every reason to favor it, as it affords a speedy remedy in cases of an urgent nature. The late statute (c) also enlarged the jurisdiction, and gave the lessor of a bankrupt lessee the power to call upon the assignees, by petition, either to accept or to deliver up the lease and the possession of the premises. This petition does not pretend to any relief under the statute, for it states that the assignees have already elected to abandon the lease, and have, in fact, given up the possession of the farm, and it neither makes out a case for, nor does it pray an order in the nature of an injunction. It therefore appears to me, that I have not jurisdiction to entertain the petition; but as the point is new, I will converse with the Lord Chancellor on the subject, before I give my judgment.

1818.

Ex parte
WARWICK.
—In the
Matter of
HAUGH.

6th April.

On this day, his Honor said, the Lord Chancellor concurred with him in thinking that, as between the lessor and the assignees of a bankrupt lessee, the court had not jurisdiction, except in cases under the statute, and upon injunction petitions.

Petition dismissed, but not with costs.

(c) 49 Geo. 3. c. 121. s. 19.

1 April 1819. *Ex parte* PARKS.—In the Matter of PRICE.

Affidavit sworn
before the pe-
tition is an-
swered, cannot
be read.

IT was objected to the affidavit filed in support of this petition, that it was sworn some days before the petition was answered. The Vice Chancellor allowed the objection, but he permitted the petition to stand over till the next day of petitions, to afford the opportunity of having the affidavits re-sworn.

Mr. *Dowdswell* for the petition.

Mr. *Bell* and Mr. *Palmer* contra.

LINC. INN, *Ex parte* FRANKLYN.—In the Matter of JAMES.
April 1819.

Where a man is a partner in separate firms, each of which becomes bankrupt, the surplus of his separate estate shall be applied in discharging the joint debts of the firms, in proportion to the whole amount of the debts proved against each firm respectively.

AMBROSE and *James* carried on the trade of grocers in copartnership, under the firm of *John Ambrose* and company. *Ambrose* also carried on the business of a linen merchant, in partnership with *Hugh Leach*, under the firm of *Hugh Leach* and company. A commission of bankrupt, bearing date the 3d day of April 1818, issued against *Leach* and *Ambrose*, and they were duly found and declared bankrupts, and assignees were chosen of their estate and effects, and an assignment of their estate, as well joint as separate, was duly executed to the assignees by the com-

missioners. The firm of *John Ambrose* and company being also insolvent, a commission of bankrupt, bearing date the 18th of *April* 1818, was awarded and issued against *James*, and under which he was duly found and declared a bankrupt, and an assignee was chosen of his estate and effects, and an assignment was executed to the assignee in the usual manner. *Ambrose* and *James* were indebted to the petitioners on their joint account, in respect of the firm of *John Ambrose* and company, in the sum of £.15 and upwards for goods furnished by the petitioners to the firm of *John Ambrose* and company. At the respective dates of the commissions, the property of the firm of *John Ambrose* and company consisted of several debts due and owing to the firm, some of which were outstanding.

1810.

Ex parte
FRANKLYN.
—In the
Matter of
JAMES.

The petition prayed that the petitioners and the rest of the joint creditors of *James* and *Ambrose* might be at liberty to prove their respective joint debts under the separate commission issued against *James*, and that it might be referred to the commissioners under *James's* commission to take distinct accounts of the joint effects of *Ambrose* and *James*, and of the separate estates of *James* possessed by the assignees under the said commission, and that the assignees under the commission issued against *Leach* and *Ambrose*, might be directed to account with the assignee under the other commission for all the joint effects of the firm of *Ambrose* and company possessed by them, and that the assignees of the joint commission might be directed to permit their names to be used by or to join as assignees with the assignee under the commission against *James*, in all matters in which it should be necessary in the judgment of the commissioners under such last mentioned commission that their

1819.

Ex parte
FRANKLYN.
—In the
Matter of
JAMES.

names should be used, or that they should so join, being indemnified out of the said joint estate of the said firm of *John Ambrose* and company, and that the joint effects of the said firm of *John Ambrose* and company, might be applied by the assignee of *James*, in the first place, towards satisfaction of the debts of the petitioners and the other joint creditors of *Ambrose* and *James*, in respect of the last mentioned firm, and after such joint effects were exhausted, and the separate debts of *James* had been paid, that the surplus of his separate estate might be carried over to the joint estates of *John Ambrose* and company; and that the petitioners and the other joint creditors of *Ambrose* and *James* might also be at liberty to prove their debts under the commission issued against *Leach* and *Ambrose*, so as to be admitted creditors of the separate estate of *Ambrose* for their joint debts, after the joint effects of the firm of *John Ambrose* and company should have been exhausted.

The only question was, how the surplus of the separate estates was to be applied.

Mr. *Beames* insisted that, according to *ex parte Bruce*, (a) each of the joint creditors of both firms were to be permitted to take a dividend in proportion to their respective debts.

The VICE CHANCELLOR said, he understood the Lord Chancellor in that case to have ordered that the surplus of the separate estate should be applied in discharge of the partnership debts of the respective firms, in proportion to the respective amount of the debts proved against such firms.

(a) Whitmarsh, T. B. L. 353.

Mr. *Heald* and Mr. *Cooke* appeared for the petitioners.

1819.

The following order was made.

Ex parte
FRANKLYN.
—In the
Matter of
JAMES.

Now upon hearing the said petition read, and what was alledged by the counsel for the said parties, I do order, that the petitioners and the rest of the joint creditors of the said *John James* and *John Ambrose*, be at liberty to prove their respective joint debts under the said separate commission issued against the said *John James*, and refer it to the major part of the commissioners named in the said last mentioned commission, to take distinct accounts of the joint effects of the said *John Ambrose* and *John James*, and of the separate estates of the said *John James* possessed by the said *William Terril*, the assignee under the said commission: and I do order, that the said *Joseph Metford* the younger, and *Thomas Cole*, the assignees under the said commission issued against the said *Hugh Leach* and *John Ambrose*, do account with the said *William Terril*, the assignee under the said other commission, for all the joint effects of the said firm of *John Ambrose* and company possessed by them, and let the said *Joseph Metford* the younger and *Thomas Cole* permit their names, as assignees of the said *John Ambrose*, to be used by, or to join as assignees with the said *William Terril*, the assignee under the commission against the said *John James*, in all matters in which it shall be necessary, in the judgment of the commissioners under such last-mentioned commission, that their names should be used, or that they should so join, being indemnified out of the said joint estate of the said firm of *John Ambrose* and company: and I do order, that the joint effects of the said firm of *John Ambrose* and company

1819. be applied by the said *William Terri*, in the first place, towards satisfaction of the debts of the petitioners and the other joint creditors of the said *John Ambrose* and *John James*, in respect of the said last mentioned firm, and after such joint effects are exhausted, and the separate debts of the said *John James* have been paid, let the surplus, if any, of his said separate estate be carried over to the joint estates of the firm of *John Ambrose* and company: and I do order, that the petitioners and the other joint creditors of the said *John Ambrose* and *John James* also be at liberty to prove their said debts under the said commission issued against the said *Hugh Leach* and *John Ambrose*; and after the joint effects of the said firm of *John Ambrose* and company shall have been exhausted as aforesaid, and the separate debts of the said *John Ambrose* have been paid, let the surplus of his separate estate be applied in payment of the debts of the said firm of *John Ambrose* and company, and of the said other firm in which the said *John Ambrose* was engaged, in proportion to the respective amount of the debts proved against the joint estates of such firms respectively; and let the costs of this application and of taking such accounts as aforesaid, be paid and borne out of the joint estate and effects of the said *John Ambrose* and *John James*.

Ex parte
FRANKLYN.
—In the
Matter of
JAMES.

Ex parte INNES.—In the Matter of SCOTT.

LINC. INN,
2 Apr. 1819.

THIS was a petition by the assignees, and it prayed that Messrs. L. and B. might be ordered forthwith to deliver to the petitioners their bill of fees and disbursements as attorneys and solicitors to the bankrupt previously and up to the date and suing forth of the commission of bankrupt, dated the 14th of March 1818, and that such bill of fees and disbursements might be signed by them, and when delivered, might be referred to one of the masters of the high Court of Chancery to be taxed, the petitioners thereby offering to pay to the Messrs L. and B. what should appear to be due and owing to them on the taxation of such bill; and that Messrs L. and B. might account upon oath before the master for such sum of money as they had received on account of the bankrupt or his estate, and be directed to pay to the petitioners what, if any thing, should appear to be due from them on the balance of their account, and that upon payment to Messrs. L. and B. what should appear to be due to them on the taxation of the bill, they might be directed to deliver upon oath to the petitioners, as the assignees of the estate and effects of the said bankrupt, all instruments, documents, papers and writings in their custody, possession or power, belonging to the bankrupt or to the petitioners, the petitioners offering to produce the same at the trial of any action or actions then commenced or which might thereafter be commenced against the bankrupt, in case the said petitioners should be required by the said bankrupt so to do.

The court has jurisdiction in bankruptcy to order the papers deposited by the bankrupt with his attorney, in actions commenced before the bankruptcy, to be delivered up to the assignees, provided they are necessary to the administration of the estate. But where assignees wanted such papers for the purpose of instituting criminal proceedings against the bankrupt, the court refused to make the order and dismissed the petition with costs.

1819.

—
Ex parte
INNES.

—In the
Matter of
SCOTT.

By the affidavit of one of the assignees, it appeared that *Richard Scott*, the bankrupt, in the month of *January 1817*, being the owner of a ship called the *Kingsmoor*, then in the port of *Liverpool*, effected insurances in *Lloyd's*, through his brokers, to the amount of £.10,000, on British manufactured cotton goods, and £.2,000 on earthenware, and £.3,000 on the said ship the *Kingsmoor*, on a voyage from *Liverpool* to *Pernambuco*, in the usual printed form, and at the premium of 40s. per cent.—That the underwriters were soon afterwards called upon under the insurances to pay a total loss, on the ground that the ship was wrecked, and the goods totally lost; and many of the underwriters paid a total loss thereon, but others refused to pay the same; and the loss so claimed on the insurances still remained unpaid to a considerable amount.—That several of the underwriters who had paid the loss having afterwards discovered that the insurances were a fraud upon them, they caused *Richard Scott* to be arrested on the 24th day of *November 1817*, for several sums of money, for money had and received; and *Richard Scott* was some time afterwards taken to *Lancaster Castle*.—That after *Richard Scott* was in custody upon the arrests, on the 4th day of *December 1817*, he executed bills of sale of two of his vessels, called the *Lady Trowbridge* and the *George*, to one *J. G.* an attorney in *Liverpool*, *W. H.* a late clerk of the said *Richard Scott*, and another person of the name of *E. F.*, a relation of *Richard Scott*, who alledged themselves to be trustees under some settlement previously executed by *Richard Scott*; and the said *J. G.* *W. H.* and *E. F.* also took possession of the said *Richard Scott's* furniture and other property in *Liverpool*, and sold the same.—That a commission of bankrupt was afterwards taken out against *Richard Scott*, on the peti-

tion of one J. G. a butcher of Liverpool, a friend of *Richard Scott*; and the solicitor to the said commission was the said J. G., who was for some time the confidential adviser and agent of *Richard Scott*.—That several of the underwriters in the *Kingsmoor* who had paid the loss, presented their petition to the Lord Chancellor, in the month of *February* last, for superseding the commission, upon the grounds aforesaid, and the same was ordered to be superseded accordingly, at the costs of the petitioning creditor.—That a commission of bankrupt, bearing date the 14th day of *March* 1818, issued against *Richard Scott*, on the petition of R. O., underwriter, under which he was duly found and declared a bankrupt, and the deponent, together with two other persons, were chosen assignees. The bankrupt duly surrendered himself under the last mentioned commission, and passed his last examination.—That the bankrupt previously to the issuing of the last commission, employed Messrs. L. and B. attorneys and solicitors, to transact certain business for him, and he deposited in their hands, as such attorneys or solicitors, divers instruments, &c. the property of the bankrupt, relating to the said ship the *Kingsmoor*, and to the estate and effects of the bankrupt, and in particular the documents mentioned in the affidavit, which were at the date and suing forth of the last commission, and still were in the custody, possession or power of the said Messrs. L. and B.; and the same being material to the assignees in the administration of the estate and effects of the said bankrupt, they applied to Messrs. L. and B. to deliver them up, but Messrs. L. and B. refused so to do, alledging a lien thereon for their bill of costs, and further alledging, that certain actions, being those in which the bankrupt was arrested, were then depending against the

1818.

—
Ex parte
INNES.
—In the
Matter of
SCOTT.

1819.

Ex parte

INNES.

—In the
Matter of
SCOTT.

said bankrupt, and that they were entitled to hold the said instruments, documents, papers and writings, as the attorneys and solicitors of the said bankrupt, for the purpose of making use of the same in the defence of such actions.—That although the said assignees had offered to pay to the said Messrs. L. and B. their said bill of costs, and also to produce the said instruments, documents, papers and writings at the trial of the said actions, yet the said Messrs. L. and B. persist in refusing to deliver them up.

This affidavit was answered by Messrs. L. and B. who stated, that in the month of *June* 1817, the bankrupt employed them to commence actions against such of the underwriters upon policies of assurance upon the ship *Kingsmoor* and her cargo, on a voyage from *Liverpool* to *Pernambuco*, as had not theretofore settled and paid the loss thereon, and that to enable the deponents to prosecute such actions, the bankrupt delivered to them the policies upon the *Kingsmoor* and her cargo, and divers other instruments, documents, papers and writings relating to the *Kingsmoor*, and to the cargo shipped on board thereof for the said voyage, and to the loss of the said ship and her cargo; and that in pursuance of the instructions which the deponents received from the bankrupt, they did commence actions against several of the underwriters on the said policies, and proceeded in the actions until further proceedings therein were restrained by an injunction issued out of His Majesty's Court of Exchequer, in a cause in that court instituted against the bankrupt by the underwriters, against whom actions had been brought; and that in *November* 1817, Mr. O. one of the attorneys for the underwriters in the defence of the actions, and who was with his partners a solicitor to the as-

assignees under the commission, called upon Mr. B. and stated to him, in consequence of having discovered that a gross fraud had been practised by the bankrupt upon the underwriters, such of them as had settled and paid the loss had commenced actions against the bankrupt, to recover back the sums which they had respectively paid to the bankrupt, and that process had been issued and sent down to Liverpool for the purpose of arresting the bankrupt, and holding him to bail for the monies last aforesaid, and Mr. C. then requested the deponent to deliver to him the policies of insurance, instruments, documents, papers and writings relating to the Kingsmoor and her cargo, and the insurance and loss thereof, as were in the deponent's possession, or to deposit the same in the hands of some third person for the inspection of all parties, and to be produced when required, or to that effect; but the deponent saith, that he refused to comply with such requests, and stated that he could not part with the possession of the policies and documents without the order of the bankrupt. On the 26th of November 1817, the deponent received from the solicitors of the assignees the following letter.

Ship Kingsmoor.

" Gentlemen.

" On the investigation of the circumstances attending this insurance, we have discovered that the three invoices of manufactured goods made out in the names of *John Baron*, *John Dodgshon*, and *Bold Cook*, and amounting together to upwards of £.10,000, were fabricated by or had request of Mr. *Richard Scott*, the alledged assured, and that the whole transactions, in regard

1819.

Ex parte
INNES.
—In the
Matter of
SCOTT

1819.

Ex parte
INNES.—In the
Matter of
SCOTT.

to the manufactured goods, is a gross fraud upon the underwriters; such may also not improbably be the case with other documents produced by Mr. Scott; but we have not yet the opportunity of inquiring into them. From the facts which have been discovered, writs have been issued at the suit of 25 of the underwriters who had paid the loss, and upon those writs Mr. Scott was arrested on Monday evening, the 24th inst. This proceeding has been adopted with a view to other steps being taken against all the parties concerned in this transaction, and we have, under these circumstances, to desire and indeed to require you not to part with the fabricated invoices or any other of the papers in your hands, until a full and complete investigation can be had, and such criminal proceedings brought to a conclusion, as it may be deemed expedient to institute against the parties.

“ We are, Gentlemen, &c.”

Messrs. L. and B. had attended upon a summons before a judge of the court of King's Bench, but no order had been drawn up for the production of the papers and instruments, owing to some informality in the summons, as was alledged by the assignees, but denied by Messrs. L. and B.

Mr. Montagu and Mr. Collinson for the assignees.

Mr. Pemberton for Messrs. L. and B.

The application ought to have been made to the court of law, as the Lord Chancellor has not jurisdiction to order papers and writings in the possession of solicitors to be delivered up, unless where

they are deposited with them in the course of business done in the Court of Chancery. But even if that were not the practice, yet as the facts of the case were fully discussed before the common law judges, upon the attendances at their chambers, and they had declined to make any order respecting the delivery of the papers, this petition is virtually an appeal from their judgment, and therefore cannot be entertained by the court. Messrs. L. and B. do not claim to retain these papers on the ground of having a lien upon them for their costs; but they retain them because they are aware that the use the assignees would make of these documents, if once they were to get them into their possession, would be to file a criminal proceeding against the bankrupt. That such is their intention, is sufficiently evident from the conversation Mr. O. had with Mr. B. upon the subject of delivering up the documents; and in the letter of the 26th November 1817, it is avowed, that the proceedings therein mentioned "had been adopted with a view to other steps being taken against all the parties concerned in the transaction; and Messrs. L. and B. were desired and required not to part with the fabricated invoices or any other of the papers, until a full and complete investigation could be had, and such criminal proceedings brought to a conclusion as it might be deemed expedient to institute against the parties." Now it is a rule both of courts of law and equity, that they will not direct papers to be delivered up for the purpose of assisting any criminal proceedings. This was determined in the time of Lord Mansfield, and has always been since considered as a fixed rule of the court; and it was upon this ground that the judges at their chambers refused to make any order upon Messrs. L. and B. for the delivery of the documents.

1819.

Ex parte

INNES.

—In the
Matter of
SCOTT.

1819.

Ex parte
INNES.—In the
Matter of
SCOTT.

The VICE CHANCELLOR thought he had jurisdiction upon an application in bankruptcy, to make the order prayed by the petition; but he was clearly of opinion that the court would not lend itself to assist the assignees in prosecuting vindictive proceedings of a criminal nature. He said, that assignees could never have the assistance of the court but where it was necessary for the due administration of the estate; and if the papers were necessary for that purpose, and it should appear to be the intention of the assignees to make a further use of them in prosecuting criminal proceedings, the court would not order the production, without at the same time restraining the assignees from using them for any purposes foreign to the due administration of the estate.

His Honor would have made an order, referring it to the master to see if the papers were necessary for the administration of the estate, and if they were, then that Messrs. L. and B. should deliver them to the assignees, they undertaking not to use them in any criminal proceeding. But the assignees preferred having their petition dismissed; and it was accordingly dismissed with costs. (*a*)

(*a*) In the act of 53 Geo. 3. c. 63. for preventing the embezzlement of securities left in the hands of bankers and others, it is provided in the fifth section, "that no person shall be liable to be convicted by any evidence whatever, as an offender against this act, in respect of any act, matter or thing done by him, if he shall at any time previously to his being indicted for such offence, have disclosed
 " such act, matter or thing on oath, under or in consequence of any compulsory process of any court of law or equity, in any action, suit or proceeding, in or to which he shall have been a party, and which shall have been instituted bona fide by the party aggrieved, by the act, matter or thing which shall have been committed by such offender aforesaid."

Ex parte TERRELL.—In the Matter of TAYLOR. LINC. INN,
2 Apr. 1819.

THE petition stated, that the bankrupt, for some years previous to his bankruptcy, carried on trade in the island of Guernsey as a butcher, and had contracts for victualling and supplying the army and navy; and in the month of *September* 1815, the bankrupt having come to London, and entered into some new contracts with Government for the supply of forage to the troops, in the Middlesex and other districts, the petitioners, who had previously some slight acquaintance with him, entered into partnership with him in such last mentioned contracts, under the firm of *Taylor, Terrel, and Grover*. That the petitioners and the bankrupt, by the agreement between them on the occasion of forming their partnership, were to have brought in the capital or funds necessary for carrying on the business of the said contracts, in equal third shares and proportions; but the bankrupt being a person of little or no property, the petitioners brought in nearly all the money required to carry on such partnership business, and accepted or permitted the bankrupt to accept bills to a large amount in their names jointly with the name of the bankrupt, for the use and on the account of the partnership, for the payment of all which bills the petitioners remain liable. Soon after the commencement of the partnership, the bankrupt having become embarrassed in his affairs, a separate commission of bankrupt was on the 1st day of *February* 1816 awarded and issued against him, under which he was duly found and declared a bankrupt, and assignees were chosen, and the usual order had been

The usual order having been obtained to take the accounts of the joint and separate estate under a separate commission, the joint estate paid 17 shillings, and was sufficient to pay the remaining three shillings in the pound, leaving a surplus in the hands of the assignees. Upon taking the partnership accounts, a balance appeared in favor of the solvent partners. The separate estate had paid 3 shillings in the pound.

Held 1st, That the bankrupt was not entitled to an allowance under 5 Geo. 2. c. 30. s. 7.

2dly, That the surplus of the joint estate was to be paid to the solvent partners, and if it proved insufficient, they were to be at liberty to prove against the separate estate for the difference.

1819.

Ex parte
TERREL.
—In the
Matter of
TAYLOR.

obtained for keeping distinct accounts of the joint and separate estates of the bankrupt and of the partnership. The petitioners advanced to carry on the business of the partnership, the sum of £.1,847 8s. 3d. and the bankrupt advanced only the sum of £.103 13s. 9d. On the final making up of the accounts of the partnership, it appeared that a loss had been sustained of £.1,951. 2s. in the business of the contracts, and on apportioning such loss between the petitioners and the bankrupt, and settling all accounts between them, the petitioners were respectively creditors of the bankrupt in the following sums: the petitioner, *James Hooper Terrell*, in the sum of £.395 2s. 11½d. and the petitioner, *John Grover*, in the sum of £.310 18s. 9½d. The joint debts owing by the petitioners and the bankrupt, and which had been proved under the commission, amounted to the sum of £.3,642 4s. 1d.; but a joint debt amounting to £.1,443 11s. 8d. having since been expunged, the amount of joint debts proved was then reduced to the sum of £.2,198 12s. 5d. The assignees had possessed themselves of funds of the estate more than sufficient to pay to the joint creditors remaining on the proceedings 20s. in the pound on their respective debts. Dividends had already been paid to the joint creditors amounting to 17s. in the pound, and the funds remaining in the hands of the assignees would yield a surplus after paying the joint creditors the balance of their respective debts, which surplus the petitioners claimed to be entitled to. The debts proved under the commission by the separate creditors of the bankrupt, amounted to the sum of £.1,544 11s. 7d. and the separate estate possessed by the assignees was rather more than sufficient to pay to the separate creditors a dividend of 3s. in the pound on their respective debts. The petition then stated, that by the statute 5th Geo. 2. c. 30. s. 7., it is

enacted, " That in case the neat produce of the estate
 " of any person who shall become bankrupt, and con-
 " form himself as in the said act is directed, shall
 " over and above the allowance thereafter made, be
 " sufficient to pay the said creditors the sum of 15s.
 " in the pound for their respective debts, that then
 " all and every such person so conforming shall be
 " allowed the sum of £. 10 per cent. out of such neat
 " produce, to be paid by the assignee or assignees, so
 " as such £. 10 per cent. shall not amount in the whole
 " to the sum of £. 300;" and that the bankrupt, under
 and by virtue of the said statute, claimed to be enti-
 tled to an allowance of £. 10 per cent. out of the
 assets of his said joint estate, or to some other allow-
 ance in respect thereof; that by reason of such claim,
 the assignees were unable to make a final dividend
 and to pay to the joint creditors the balance of their
 respective debts, and to pay over to the petitioners
 the surplus that might remain of such joint estate,
 after such further payment and division, and in con-
 sequence thereof the joint creditors threatened and
 intended to sue the petitioners for payment of the ba-
 lances. The petition therefore prayed, that the as-
 signees might make a final dividend of the funds of
 the joint estate remaining in hand, and that it might
 be referred to the commissioners under the commis-
 sion to take account of the debts respectively due from
 the partnership of *Taylor, Tyrrell and Grover* to the
 petitioners respectively, and that the surplus, if any,
 of the funds of the joint estate, after paying 20s. in the
 pound to the joint creditors, or after retaining enough
 for that purpose, might be paid over to the petitioners
 in or towards satisfaction of the debts that might be
 found due and owing to them respectively, and that
 in case, after such payment, any balance should re-

1819.

Ex parte
 TYRRELL.
 —In the
 Matter of
 TAYLOR.

1819. main due and owing to the petitioners respectively from the bankrupt, the petitioners might be admitted to prove as creditors against his separate estate for the amount of their respective balances, and might receive a dividend or dividends equally with the other separate creditors of the bankrupts.

Ex parte
TYRRELL.
—In the
Matter of
TAYLOR.

Mr. Cullen for the assignees.

The bankrupt is not entitled to any allowance, as the payment to the joint creditors is not the sort of payment contemplated by the statute. (a) It is not a payment under the bankruptcy, but under an order in the nature of a decree upon a bill for an account in equity. In the case of *ex parte Farlow*, (b) where a commission issued against one of a partnership, and under the usual order for keeping distinct accounts the joint estate paid 18s. in the pound, and the separate estate 2s. the Lord Chancellor thought the order was a mere mode of arrangement which could not entitle the bankrupt to the privileges given by the statute.

THE VICE CHANCELLOR.

The principle upon which that case and others of the like nature have gone, is, that the payment is not in point of fact a payment by the bankrupt, for he is only entitled to so much of the property as may appear to belong to him upon the result of the partnership accounts. (c)

(a) 5 Geo. 2. c. 30. s. 7.

(b) 1 Rose, B. C. 421.

(c) The cases upon the 7 sec. 5 Geo. 2. c. 30. are collected 1

Rose, B. C. 421. And also see *ex parte Powell*, 1 Mad. 68. *Ex parte Holmes*, 2 Rose, B. C. 95. 3 Ves. and B. 137. S. C.

His Honor, upon reference to the cases of *ex parte Taylor (d)* and *ex parte King, (e)* made an order to the effect prayed.

Mr. Rose appeared for the petitioners,

Mr. Collinson for the bankrupt,

1819.

Ex parte
TYRRELL.
—In the
Matter of
TAYLOR.

Ex parte SIKES.—In the Matter of WILKINSON. LINC. INN,
5th April,
1819.

WILKINSON, previous to his bankruptcy, had written the following letter to Messrs. Sikes, Snaith, & Co. the petitioners.

In all cases where there is an equitable mortgage by a written instrument, specifying the terms of the agreement, the mortgagee upon the usual petition for a sale of the premises, is entitled to his costs.

14th July, 1815.

"Sirs,

"I engage on request to convey to you my two
"undivided third parts of and in divers free-
"hold, copyhold and leasehold messuages and
"tenements, situate, &c. as a further collateral
"security for the general account, present as
"well as future, of my partners, G. S. and J. J. L.
"and myself, as bankers with you, and in ad-
"dition to the other securities you already pos-
"sess for that account.

"I remain, &c."

(d) 2 Rose, B. C. 175.

(e) 17 Ves. 115.

1819. It did not appear there had been any deposit of the title deeds of the premises mentioned in the said letter.

Ex parte
SIKES.

—In the
Matter of
WILKINSON.

The only question was, whether the petitioners, being equitable mortgagees, were entitled to their costs.

The VICE CHANCELLOR thought the principle of the Lord Chancellor, delivered in *ex parte Brightwen*, (a) governed the present case, and that in all cases where there was a written instrument, the mortgagee was entitled to his costs out of the estate,

Mr. Cullen for the petitioners.

Mr. Rose contra.

LINC. INN, *Ex parte* HEMING.—In the Matter of POWELL.
3 Apr. 1819.

A judgment creditor having been directed to try the validity of the commission, succeeded upon the trial. The petitioning creditor directed to pay the costs of superseding the commission, and of the petition.

MR. Hart and Mr. Rose for the petitioner.

Mr. Wetherell for the petitioning creditor.

The VICE CHANCELLOR.

In this case a commission issued for the purpose of defeating a judgment creditor. It was necessary that

(a) Ante 148. 1 Swan, 3 S. C.

he should come here to supersede the commission, and he was directed to try its validity at law. He has succeeded upon the trial; and I am of opinion that he ought to have his costs against the person who has improperly occasioned this expence.

1819.

Ex parte
HEMING.
—In the
Matter of
POWELL.

Let the commission be superseded at the costs of the petitioning creditor, and let him pay the costs of this petition.

Ex parte HORNBY.—In the Matter of
TARLETON.

LINC. INN,
7 Apr. 1819.

ON the death of *John Tarleton* the elder, formerly of Liverpool, a copartnership took place between *Thomas Tarleton* of Liverpool, *John Tarleton* the bankrupt, sons of *John Tarleton* the elder, and *Daniel Backhouse* of Liverpool, merchant, since deceased, under the firm of *Tarleton and Backhouse*. On the decease of *John Tarleton* the elder, who had been extensively engaged in business as a West India merchant, the *Tarletons* and *Backhouse* and *William Harper*, since deceased, agreed to purchase, on their joint account, various outstanding debts and effects belonging to *John Tarleton* the elder. The *Tarletons* and *Backhouse* and *William Harper* afterwards purchased, in copartnership, divers ships and vessels, which were sent out on their joint account and risque to the West Indies. Various home or return cargoes were sent from the West Indies to England on the joint account of the *Tarletons* and *Backhouse*, and of *William Harper*;

Proof under a commission is equivalent to payment; therefore when solicitors had obtained an order to have their bill taxed and to prove for the amount, it was held that they had relinquished their lien upon the papers in their hands belonging to the bankrupt.

1819.

Ex parte
HORNBY.
 —In the
 Matter of
TARLETON.

and they had other dealings and transactions together as partners. The *Tarletons* and *Backhouse* also employed *William Harper* as their agent in the West Indies, and sent out and consigned to him sundry cargoes of goods and adventures. *William Harper* laid out and invested the monies arising from the sale of such cargoes and adventures, in the purchase of goods and merchandizes, the produce of the West Indies, and made large gains and profits thereby, for which he had not yet accounted with the *Tarletons* and *Backhouse*. *Thomas Tarleton*, *John Tarleton* and *Daniel Backhouse* instituted a suit in chancery against *William Harper* concerning those dealings and transactions, but the suit became abated by the death of some of the parties. *John Tarleton* and *Daniel Backhouse* purchased the share of *Thomas Tarleton* in the partnership estate and effects, whereby they became entitled to the debts and claims against *William Harper*. *Daniel Backhouse* died some time since, and in his life time the bankrupt became a purchaser of his share of the partnership estate and effects, and became solely entitled to the claims of the *Tarletons* and *Backhouse* against *William Harper*. *John Tarleton* had not yet surrendered himself to his commission. A suit had been instituted in the court of chancery of Lancaster, by *Thomas Turner* and *Mary Harper*, widow, executor and executrix of *George Harper*, deceased, against *John Hoskin Harper* and others, in order to have the estate of *William Harper*, who died intestate, duly administered under the directions of that court, and in which cause the usual decree was made, and the petitioners being desirous of coming in under the decree, had made a claim in that suit of £.12,000 and upwards, which they estimated to be due to them, as the assignees, from the estate of *William Harper*, but the petitioners could not ascer-

tain the amount of what was due to them, by reason that Messrs. *Lowe* and *Cowburn*, solicitors, had in their possession numerous books, accounts, papers, and writings, upon which they claimed a lien in respect of their bill of costs.

1819.

Ex parte
HORNBY.
—In the
Matter of
TARLETON.

The petition proceeded to state other claims that the firm of *Tarleton* and *Backhouse* had upon various persons, the papers and documents relating to which were in the hands of Messrs. *Lowe* and *Cowburn*.

The petition therefore prayed, that Messrs. *Lowe* and *Cowburn* might be directed to permit the petitioners or their agents or any of them, pending the settlement and adjustment of their claim as to their bill of costs, to inspect the books, papers and writings of the bankrupt, and the proceedings in the matters before mentioned, in their possession, at all reasonable times, and on giving reasonable notice, and that the petitioners might be at liberty to take copies therefrom or extracts therefrom, as they should be advised, at their own expence, and also that Messrs. *Lowe* and *Cowburn* might be directed to produce or place in the hands of some agent, for the purpose of production, the said books, papers and proceedings relating to the said demands against the said *William Harper* or his partners, before the proper officer of the said court of chancery of *Lancaster*, on the taking the accounts in the said cause of *Turner v. Harper*, and on the hearing of the same on further directions if necessary.

Messrs. *Lowe* and *Cowburn* had obtained an order under the commission to have their bill of costs taxed, and to be permitted to prove the amount of the same when taxed.

1819.

Ex parte
HORNBY.
—In the
Matter of
TARLETON.

It was contended on behalf of Messrs. *Lowe* and *Cowburn*, that although where a bankrupt in his examination before the commissioners refers to books and other writings and documents, thereby making them a part of the proceedings under the commission, a solicitor cannot retain them as against the assignees; yet the present case was not of that class: there was no pretence for saying that the papers and documents in the hands of Messrs. *Lowe* and *Cowburn* formed a part of the proceedings under the commission. It was also argued, that a solicitor had a lien of the same nature upon the papers in his hands for the payment of his bill of costs, as a mortgagee, by deposit, has upon the title deeds, and that the court would not in the one case more than in the other, compel the party to give up his lien until he has received the full amount of his debt.

The VICE CHANCELLOR.

Where a solicitor who has papers in his hands relating to the bankrupt's estate, upon which he claims a lien for his bill of costs, comes in under the commission, and proves his debt, such proof is equivalent to payment, and he must deliver up the papers to the assignees.—I consider Messrs. *Lowe* and *Cowburn*, in consequence of the order made upon their application, to have submitted to the proof of their debt. After the taxation of their bill they must give up to the assignees all the documents they have in their possession which relate to the property and interests of the bankrupt, and are necessary to the administration of the estate, and until the taxation, the assignees must be at liberty to inspect the papers.

Sir Arthur Piggot, Mr. Trower, and Mr. Rose appeared for the petition. 1819.

Mr. Bell and Mr. Harrison contra.

Ex parte
HORNBY.
—In the
Matter of
TARLETON.

Ex parte SMITH.—In the Matter of POWER and WARWICK. LINC. INN,
7 Apr. 1819.

THE facts presented to the court by this petition, and which it was admitted were truly stated, were the following:—*Power and Warwick* for several years and until the time of their bankruptcy, carried on business in copartnership together as merchants in London, under the firm of *John Power and Co.* and in the course of their business traded extensively to the continent of Europe, and had many correspondents abroad. The petitioner carried on business as a merchant at Hamburg, and for some time previously to and until the time of their bankruptcy, employed Messrs. *John Power and Co.* as the petitioner's correspondents in Great Britain. The transactions between *John Power and Co.* and the nature of their employment and agency, was as follows:—When the petitioner had occasion to draw on London, or the course of exchange between Hamburg and this country offered any advantage upon such drafts, the petitioner was in the habit of drawing bills accordingly on *John Power and Co.* or passing drafts on them as against remittances or property of the petitioner forwarded to or in the hands of *John Power and Co.* or as against drafts drawn by *John Power and Co.* on the petitioner

Whether bills in the possession of a bankrupt, not due at the time of the bankruptcy, pass to the assignees or remain the property of the remitter, always depends upon the question of agency. So where a foreign mercantile house remitted to a London house bills some of which were not due when the London house became bankrupt, it was held, under the circumstances of the case, that the London house acted as agents to procure payments for the foreign house, and being fixed with the trust, that the bills did not pass to the assignees.

1819. or his correspondents; and in respect of their agency or employment, *John Power* and Co. charged the petitioner with commission at the rate of a half per cent. The account (with the exception of one transaction, which was the consignment of 14 casks of walnuts by the petitioner to them, the proceeds of which amounted only to £.22 13s. 5d.) was entirely in the nature of a banking account between London bankers and their country correspondents or customers. In the month of Oct. 1819, *John Power* and Co. drew on the petitioner on their own account for 22,000 marks banco, at three months, which the petitioner accepted and paid. *John Power* and Co. subsequently made the petitioner a remittance of 960 marks banco on account thereof. On the balance of the said last mentioned transaction, there was a sum of £. sterling due to the petitioner. On the 10th of November 1818, the petitioner drew three bills of exchange on Messrs. *John Power* and Co. in favour of Messrs. *R. Groning* and Co. one of the bills being for £.360, another for £.340, and the third for £.300, and amounting in the whole to the sum of £.1,000. The petitioner wrote and sent the following letter to Messrs. *John Power* and Co. advising them of the drafts.

Messrs. *John Power* and Co.
London.

Hamburg, November 10th 1818.

" Dear Sirs,

" I confirm my respects of the 3rd current,
" advising my draft upon you for £. 150 sterling,
" in favor of Captain *Peter Tate*, at 2 months
" date, and flatter myself it will have met your

CASES IN BANKRUPTCY.

357

" kind protection. Being since deprived of your
 " esteemed favors, the present serves to advise
 " that I have, under the present date, taken the
 " liberty of valuing further upon you as follows :
 " viz.

1819.

Ex parte
 SMITH.

—In the
 Matter of
 POWER and
 WARWICK.

" £.360 sterling	}	To the order of <i>R. Groning</i> and Co. 2 months date.
" 340 - - -		
" 300 - - -		

" £. 1,000 sterling together, which you will
 " please to honor and pass to my debit, under
 " the full assurance that I will provide you with
 " funds to meet their payment at maturity.
 " Your remittances for £. 63 14s. 9d. sterling on
 " our mutual friend Mr. *Thomas Tatlock* is ac-
 " cepted, and shall in due course be placed to
 " your credit, &c."

And on the 1st day of *December* 1818, the petitioner
 sent another letter to them, which had reference to
 the bills in favor of *R. Groning*.

" Dear Sirs,

" I am in due receipt of your esteemed favors
 " of the 20th and 27th ultimo. In reply to the
 " same, I am much obliged for the ready honor
 " shewn to my three drafts upon you, together
 " £. 1,000 sterling in favor of *R. Groning* and Co.
 " at 2 months date, and not three from the 10th
 " of *November*, and you may rely on my punc-
 " tuality in covering you for the same in due
 " time. I observe that Mr. *John Brough* hath
 " again drawn upon you for my account a further
 " sum of £. 250 sterling in favor of Messrs. *Hicks*,
 " *Jenkins* and Co. at 60 days sight, and that his
 " letter to you is dated 23d *October* from New

1819.

Ex parte
SMITH.—In the
Matter of
POWER and
WARWICK.

“ York. I am obliged by your having honored
 “ his draft, and request you will in due time take
 “ your reimbursement upon me for the same,
 “ including your charges, &c.”

On the 18th *December* following, the petitioner, in pursuance of the terms expressed in his said letters, and of the course of dealing between him and Messrs. *John Power and Co.* remitted to them bills of exchange to the amount of £.1,023 1s. 9d. and the bills were inclosed in or accompanied by the following letter :

Hamburg, *December* 18th 1818.

“ Dear Sirs,

“ I confirm my respects of the 11th current,
 “ since which being without any of your es-
 “ teemed favors, the present serves to remit you
 “ as follows: viz.

£. s. d.

“ 500 — — sterling, dated this day. Koops
 and Backhenser's draft on
 Fred. Fourud, of your city,
 at 2 months.

“ 150 — — ditto, T. U. Schiller, draft at 2
 months, on G. Flint & Co.

“ 23 1 9 ditto, my draft on J. Gore & Co.

“ 136 — — } Stettin, 24th *November*, J. W.

“ 120 — — } Rakins, at 3 months, on Ja-

“ 104 — — } cob Flagen, jun.

£.1,023 1 9 sterling together, with which you
 “ will please to do the needful, and place the
 “ amount to my credit when in cash. My wish was
 “ to have remitted you bills at a shorter date, but
 “ it was not possible to obtain them, &c.”

CASES IN BANKRUPTCY.

359

In acknowledgment of the remittance of £.1,023
. 9d. Messrs. *John Power* and Co. wrote on the
11th December the following letter to the petitioner:

1819.

Ex parte
SMITH.

—In the
Matter of
POWER and
WARWICK,

London, 29th December, 1818.

“ Sir,

“ Confirming the letter which we had the
“ pleasure of writing to you the 22d inst. to
“ which we crave your reference, we have to
“ acknowledge the receipt of your esteemed fa-
“ vors of the 18th and 22d, the former of which,
“ by original and duplicate, that of the 18th,
“ contained six remittances, amounting together
“ to £.1023 1s. 9d. with which the needful shall
“ be done to your credit in due course. They
“ have all met due honor on presentation, except
“ the £.150 bill on G. Flint and Co. who had
“ not yet received advice, but had no doubt that
“ they should soon receive it, as all the Hamburg
“ mails due arrived this morning. We hope,
“ ere we close the present, to be enabled to in-
“ form you that it has been accepted. Due ho-
“ nor is prepared to the draft advised by your
“ letter of the 22d for £.178 11s. in favor of
“ A. H. Norwich, at 2½ months date, which is
“ passed to your debit in account. On the 23d
“ instant, we received from the interior the fol-
“ lowing first bills of exchange duly accepted,
“ viz.

£. s. d.

“ 445 1 2 } On W. Parkin, of Driffeld,
“ 173 14 8 }

“ 60 5 5 on Winter and Co. of Hull,
“ the former and latter of which have been deli-
“ vered to the holders of the respective seconds,

1819.

" Your remittance above mentioned for £. 150
 " has been accepted."

Ex parte

SMITH.

→ In the
 Matter of
 POWER and
 WABWICK.

All the bills of exchange were duly accepted, and remained in the possession of *John Power* and Co. to be received when due. A few days after the last letter was written, Messrs. *Power* and Co. were compelled to suspend their payments, and on the 15th day of *January*, 1819, and before the bills remitted by the petitioner or any of them became due, a commission of bankrupt issued against them, under which they were found and declared bankrupts, and assignees were chosen and appointed of their estate and effects, and the usual assignment was executed to them accordingly. The bills of exchange for £. 1,000 in favor of Messrs. *R. Groning* and Co. became due on the 18th of the month of *January*, and having been dishonored by Messrs. *John Power* and Co. were taken up by or on the behalf of the petitioner. The bills of exchange remitted by the petitioner to the said Messrs. *John Power* and Co. and intended to meet the drafts for the sum of £. 1,000 (with the exception of one for £. 23 1s. 9d. on *John Gore* and Co. which had been negotiated by *John Power* and Co.) remained in their hands at the time of the said bankruptcy, and had been given up by them to their assignees. The petition insisted, that Messrs. *Power* and Co. under the terms of the letter which inclosed the bills to them from the petitioner, in which they were directed to place the amount to his credit " when in cash," and of their letter acknowledging the receipt of the remittance, and stating that the bills had met due honor on presentation, and that the needful should be done with them to the petitioner's credit " in due course," they had no authority to dispose of the same or to carry them to the credit of the peti-

tioner in account, till they became due in cash; more especially as at the time such remittance was made to them, the petitioner was not indebted to them on any other account, to which the same could with propriety have been placed; for although the petitioner admitted that Messrs. *Power* and Co. had under the guarantee of the petitioner paid a bill of £. 200 drawn on them by Mr. *John Brough*, and which became due on the 23th of *November*, 1818, and had also accepted under the like guarantee another bill drawn by him for £. 250, which became due on the 30th of *January* last (and which latter bill having been dishonored by them had since been taken up by or on the behalf of the petitioner), the petitioner had expressly requested Messrs. *Power* and Co. to take their reimbursements, by drawing upon him for such last mentioned bills, including their charges; and that the petitioner was advised, that the bills of exchange which with the exception of the bill for £. 23 1s. 9d. remained undisposed of by Messrs. *Power* and Co. and were distinguishable from and unmixed with their general assets, ought either as short bills or as remittances applicable to a specific purpose, to be returned to the petitioner, who, exclusively of the amount of the said bills, was (including the balance due to him on the bills they drew on him in the month of *October* last for 22,000 marks banco) a creditor of Messrs. *John Power* and Co. to the amount of £. 1,433, and who, by taking up his drafts on them, had relieved their estate from all liability on the part of or for their engagements with or on account of the petitioner; and that the petitioner being advised that he was entitled to have the bills of exchange delivered up to him, had applied to the assignees for that purpose, but the assignees, although they did not dispute the circumstances on which the petitioner's claim arose, yet

1819.

—
Ex parte
SMITH.

—In the
Matter of
POWER and
WARWICK,

1819. declined to deliver up the same to the petitioner

Ex parte
SMITH.

—In the
Matter of
POWER and
WARWICK.

without his Lordship's sanction; and that in order to obviate the necessity of the petitioner giving notice to the several acceptors of the bills not to pay the same, when due, to the assignees or to the holders thereof claiming through them, the assignees had agreed with the petitioner that they would invest the proceeds of the bills, as they should be received, in the purchase of exchequer bills, to abide his Lordship's order. The petition prayed that the petitioner might be declared to be entitled to the said several bills of exchange, or to the proceeds thereof when received, and that the assignees might be ordered to deliver up the bills of exchange to the petitioner, or the proceeds thereof respectively, as and when the same should be received by them respectively, and that the assignees might be by his Lordship's order restrained from negotiating or parting with the bills, any or either of them, otherwise than to the acceptors thereof, upon the same being taken up respectively, and that the assignees might be ordered to invest the proceeds of the bills, &c.

Upon the opening of this petition, the Vice Chancellor desired to hear what the assignees had to say in opposition to it.

Mr. Bell for the assignees.

The petitioner ought, in order to make out his right to these bills, to shew that they were specifically appropriated for a particular purpose, as was done in *ex parte Dumas*, (a) where it appeared that the

(a) 1 Atk. 232.

petitioners had acquainted the bankrupts that the bills were intended for the proper and particular account of the petitioner's house at Cadiz, and desired them to open a new account for the bills in their books and to keep the same separate and distinct from their own, and to distinguish such new account by a partnership mark or letter. But in the present case it appears there was a general mercantile dealing between the petitioner and the house of *Power and Co.* and the bills remitted were not entered in any separate book, but were carried to the general account; nor does it appear that there is any thing in the case to take this particular transaction out of the general rule respecting remittances received by one house of trade from another, and carried to the general account. The petitioner was a merchant residing at Hamburg; and Messrs. *Power and Co.* carried on the business of general merchants in London. They were not bankers. So that any rule which the court may have adopted in the case of short bills with reference to bankers, is not applicable in the present instance. At all events the court will not decide upon the claim without first directing some inquiry into the nature of the transactions.

1819.

Ex parte
SMITH.
—In the
Matter of
POWER and
WARWICK.

Mr. *Heald* and Mr. *Rose* for the petitioners.

We say the bills were remitted upon a banking account, and we claim to be entitled to them upon the authority of those cases where it has been determined that a customer paying bills not due into his banker's house, is entitled to recover back such bills in specie from the assignees of the bankers. (*b*) Messrs.

(*b*) *Giles v. Perkins*, 9 East and Leeds banks, 1 Rose 232.
12. *Ex parte the Hull, Wakefield* 243. 254.

1819. *Power* and Co. were the petitioner's bankers. He drew upon them and remitted bills to answer his drafts; it is true they also were general merchants, but it is competent for every banker to trade also as a merchant, and such dealing will not influence the court in deciding upon points that relate to his banking transactions.

Ex parte
SMITH.
—In the
Matter of
POWER and
WARWICK.

The VICE CHANCELLOR said,

In cases of this nature the question always turns upon the fact whether the bills are remitted in order that the party to whom they are sent may recover the amount, as the agent to the person remitting, or whether the bills are so sent on a general account between the parties, that the person receiving them has a right to deal with them for his own use—Certainly bankers are the persons who are employed in such agencies; but a merchant or any other person may be so employed. In considering the fact of agency, it is a circumstance of evidence that the parties stand in a relation to each other, in which such agencies are in the usual course of business. In this case the admitted facts exclude all doubt as to the actual nature of the transaction. Messrs. *Power* and Co. are desired to do the needful with the bills, and to place the amount to the petitioner's credit when in cash. In answer, Messrs. *Power* and Co. say, "the needful shall be done." They were bound therefore to receive the amount of the bills as the agent of the party remitting, and were not at liberty to deal with the bills for their own purposes.

Ex parte DALE.—In the Matter of BARKER.

LINC. INN,
8 Apr. 1819.

DALE the petitioner, who was the trustee under a will, upon trust to sell the lease of a brewhouse, plant and fixtures, [the cestuique trusts being infants,] contracted with *Barker* to sell the premises to him, and let him into possession, which was done accordingly. The trustee filed a bill against *Barker* for a specific performance of the agreement, and at the hearing of the cause it was decreed, that upon payment of the purchase money, a conveyance should be executed of the premises. The purchase money was not paid pursuant to the decree, nor was the assignment executed; but the lease being on the point of expiring, *Barker* applied for permission to renew it in his own name, and being permitted, he obtained a renewed lease, which he deposited with *Dale* as a security for the purchase money. A commission having issued against *Barker*, under which he was declared a bankrupt, this petition was presented to have the lease, plant and fixtures sold, and applied in satisfaction of the purchase monies, and if the proceeds of the sale should not be sufficient, then that the petitioner might be permitted to prove for the difference:

The only question was as to the petitioner's lien upon the plant, or whether it passed to the assignees under the statute, (a) as being in the ordering and disposition of the bankrupt.

(a) 21 Jac. 1. c. 19, sec. 10 and 11. See the cases collected ante, 152, note.

1819. Mr. *Parker* for the petition.

Ex parte

DALE.

—In the
Matter of
BARKER.

The bankrupt was not in possession with such consent of the true owner, which the statute requires; for the true owners were the cestuique trusts, who were infants, and were not capable of consenting. Nor was the bankrupt in the possession as the apparent owner, for the suit which the trustee had commenced against him was notice to all the world of the nature of the possession.

Mr. *Bell* appeared for the assignees.

THE VICE CHANCELLOR.

If the vender here had been possessed of the plant in his own right, it is admitted that it would have been passed to the assignees under the statute of James. I think it makes no difference that he was a trustee for infants. In order to avoid fraud upon creditors, the commissioners are to sell goods or chattels which are left in the possession, order or disposition of the bankrupt, with the consent of the true owners. By the true owner here is to be intended the person who has the legal right to the possession and the power of dealing with the property—and such a person was this trustee. I can only order the lease to be sold.

Ex parte BUCKLEY.—In the Matter of
DICKENSON.

E. TERM,
23d April
1819.

A DOCKET had been struck, but nothing further was done towards prosecuting the commission for a month and upwards. Upon an application at the bankrupt office, the officer refused to let the commission issue, without an affidavit that the petitioning creditor's debt had not been paid.

If a petitioning creditor do not proceed to issue the commission till after a month has elapsed from the striking of the docket, he must make an affidavit that the debt has not been satisfied, before the commission can issue.

Mr. Hart, after stating the circumstances of the case, moved that the commission might issue.

The Lord Chancellor said he would inquire into the practice.

THE LORD CHANCELLOR.

May 1st.

I do not find that there has been any general order made; but the practice for fifty years back has been, after a month has passed from the striking of the docket without any thing further having been done, for the officer to require an affidavit that the petitioning creditor's debt has not been satisfied, before he lets the commission issue. I will let you make such an affidavit, and in the mean time no other commission shall issue.

LINC. INN,
10 June 1819.

HARTLEY and others against SMITH.

Where the validity of a deed depends upon the bona fides of the transaction, to be collected from extrinsic circumstances, a court of equity will not compel a purchaser to accept a title under the deed, because neither the purchaser nor the court has adequate means of ascertaining those circumstances. Whether a deed of grant of personal chattels containing a stipulation for the grantors continuing conditionally in possession is for that reason fraudulent and an act of bankruptcy. Qu.

THIS was a bill filed by *James Hartley* and the partners in the *Halifax bank*, against the defendant, for the specific performance of an agreement for the sale of certain houses situate at *Bingley* in the county of *York*. The usual reference as to the title had been directed to the master. It appeared by the abstract of title brought in to the master's office, that by indentures of lease and release of the 1st and 2d June 1808, the release being made between *Charles Hartley*, *William Hartley* and *Thomas Hartley*, manufacturers of cotton warps, of the 1st part, *Isaac Lane* of the 2d part, and *James Hartley* of the 3d part:—Reciting, that *Charles Hartley*, *William Hartley*, and *Thomas Hartley* were seized to them and their heirs tenants in common of an estate in fee simple of and in the entirety of the hereditaments thereafter described, and were also possessed of the cotton mill, utensils, machines and other things thereafter bargained and sold, as copartners; and reciting that *Charles Hartley*, *William Hartley* and *Thomas Hartley* being in want of money, had applied to and requested *Isaac Lane* to advance and lend them the sum of £.1,000, which *Isaac Lane* consented to do upon having the repayment thereof secured to him, with interest, in manner thereafter mentioned; and reciting that *Charles Hartley*, *William Hartley* and *Thomas Hartley* were and stood justly indebted unto *James Hartley* in the sum of £.1,000, and that *James Hartley* was besides in the habit of accepting bills for *Charles Hartley*, *William Hartley* and *Thomas Hartley*; and reciting

that it had been agreed between the parties to the indenture, that *Charles Hartley, William Hartley and Thomas Hartley* should secure the payment of £. 1,000, with interest for the same, unto *Isaac Lane*, his executors, administrators or assigns, and the sum of £. 1,000, with interest for the same, unto *James Hartley*, together with such other sum or sums of money as *James Hartley* should advance and pay for or on account of *Charles Hartley, William Hartley, and Thomas Hartley*, by reason of his acceptances, by a conveyance of the hereditaments thereafter particularly described, and also of the said cotton mill, machinery, chattels and effects thereafter bargained and sold unto the said *James Hartley* his heirs and assigns, upon the trusts thereafter expressed; and reciting a bond of even date, whereby *Charles Hartley, William Hartley, and Thomas Hartley* had jointly and severally bound themselves to *Isaac Lane* in the penal sum of £. 2,000 as a collateral security for the payment of the sum of £. 1,000 with interest. It was witnessed that for carrying the agreement into effect, and in consideration of the sum of £. 1,000 to *Charles Hartley, William Hartley and Thomas Hartley* at their special request paid, lent, and advanced by *Isaac Lane*, and in consideration of the said debt or claim of £. 1,000 so due and owing from *Charles Hartley, William Hartley and Thomas Hartley* unto *James Hartley* as aforesaid, and other nominal considerations therein mentioned, *Charles Hartley, William Hartley and Thomas Hartley* did grant, &c. unto *James Hartley* the premises therein mentioned, including those contracted to be sold to the defendant, To hold unto and to the use of *James Hartley* his heirs and assigns for ever, upon the several trusts, and to and for the several ends, intents and purposes, and under and subject to the powers, &c. thereafter expressed. And it was

1819.

HARTLEY
and others
v
SMITH.

1819. also witnessed, that in further execution of the said
HARTLEY agreement, and for the purposes aforesaid, and the
and others nominal considerations therein mentioned, *Charles
v. Hartley, William Hartley and Thomas Hartley* did bar-
SMITH. gain and sell, assign, transfer and set over unto *James
Hartley*, his executors, administrators and assigns, all that cotton mill then lately erected upon some part of the said premises, and also the machinery and other apparatus, frames and utensils used for spinning cotton, and which were upon and about the said hereditaments and premises or some part thereof, to hold unto and to the only proper use of the said *James Hartley*, his executors, administrators and assigns, upon the trusts thereafter mentioned. And it was declared that *James Hartley*, his heirs, executors, administrators and assigns respectively, should stand and be seized and possessed of the said premises, upon the trust that *James Hartley*, his heirs, executors and administrators, should permit *Charles Hartley, William Hartley and Thomas Hartley*, their heirs, executors, administrators and assigns respectively, to receive and take the rents, issues and profits, use and advantage of all and singular the said premises until default in the payment to *Isaac Lane* of the said sum of £. 1,000 and interest, at the rate, time, and in manner mentioned in the condition of the recited bond, and also until default should be made in the due and punctual payment to *James Hartley*, his executors, &c. of the said sum of £. 1,000 due to him as aforesaid and interest for the same, at the rate, time, and in manner in the covenant thereafter contained for payment thereof, and also until default should be made in the due and punctual payment of any sum or sums of money, to the amount of £. 500 or upwards, which should be advanced and paid by *James Hartley* unto and to and for the use or on account of *Charles, Hartley, William Hartley and*

Thomas Hartley, by reason of his accepting bills for them, but in case of default in the due and punctual payment of the said two sums of £. 1,000 and £. 1,000 and interest respectively in manner aforesaid or either of them or any part thereof, or if there should be at any time such sum of £. 500 over due or unpaid by or for the space of 14 days next after notice thereof should be given or left by *James Hartley*, his heirs, executors or administrators, unto or for *Charles Hartley*, *William Hartley* and *Thomas Hartley*, their heirs, executors, administrators or assigns, any or either of them, and demand made for the same, then upon trust that *James Hartley*, his heirs, executors or administrators respectively should and did, upon giving one calendar month's notice for that purpose, either by public sale or private contract, and in such lots, parts or parcels as he or they should think most convenient, but for the best price or prices and for the most money that could be reasonably obtained for the same, sell and absolutely dispose of all and singular the hereditaments and premises and chattels thereinbefore mentioned with their respective appurtenances or a sufficient part thereof, and the equity of redemption thereof, and should for that purpose execute and deliver all such deeds, &c. as should be necessary or advisably effectually to convey the premises or such parts thereof as should be sold as aforesaid, to the person or persons who should purchase the same respectively, their respective heirs, executors, administrators and assigns, absolutely for ever. And it was declared that *James Hartley*, his executors and administrators, should in the first place, out of the money arising from such sale or sales, pay unto *Isaac Lane*, his executors, &c. the sum of £. 1,000 and all interest due thereon, and in the next place retain and reimburse himself and themselves all and every such

1819.

HARTLEY
and others
v.
SMITH.

1819. costs, &c. as he or they should expend by causing
HARTLEY said premises or any part or parts thereof respectively
and others to be sold, and in making proper abstracts of the title
v. thereto or otherwise respecting such sale or sales, any
SMITH. act necessary to be done by him or them in pursuance
of the trusts aforesaid, or any covenant, clause, &c.
therein contained or expressed, and after payment
thereof should in the next place retain and reimburse
himself and themselves the sum of £. 1,000 and interest
and all such other monies as *James Hartley* should
have advanced and paid on account of *Charles Hartley*,
William Hartley and *Thomas Hartley*, and should be
over due and in arrear for the space of 14 days as
aforesaid, together with lawful interest for the same;
and after the said several deductions and payments
should be made as aforesaid, then *James Hartley*, his
executors or administrators, should pay the residue
of such money unto *Charles Hartley*, *William Hartley*
Thomas Hartley, their executors, &c. and that *James*
Hartley, his heirs, executors or administrators, should
then reconvey and reassure and assign such part or
parts of the said trust premises as should then
remain unsold, unto *Charles Hartley*, *William Hartley*
and *Thomas Hartley*, their heirs, executors, adminis-
trators and assigns respectively, according to the na-
ture of their estates and interest therein, or as they
should direct or appoint, and to stand seized and
possessed thereof respectively in trust for them.
And it was provided that upon any sale or sales of
the trust premises, the receipt in writing of *James*
Hartley, his heirs, and assigns, should be good dis-
charges to the purchasers, who should not afterwards
be answerable or accountable for such purchase
money; and in case *Charles Hartley*, *William Hartley*
and *Thomas Hartley*, their heirs and assigns, should
pay the two several sums of £.1,000 and £.1,000 and

interest respectively, and all and every sum or sums of money in arrear as aforesaid with interest, at any time previous to the expiration of such notice as aforesaid, before any sale, then no sale of said trust premises should be made, and the notice given for that purpose should be void. And that at any time when the dealings should cease between *Charles Hartley*, *William Hartley* and *Thomas Hartley* and *James Hartley*, and the accounts made up and all monies paid, or at any other time when there should be nothing remaining due from *Charles Hartley*, *William Hartley* and *Thomas Hartley* to *Isaac Lane* and *James Hartley*, or either of them, no sale having taken place according to the aforesaid trusts, *James Hartley* should at the request of *Charles Hartley*, *William* and *Thomas Hartley*, their heirs, executors, administrators or assigns, reconvey the said trust premises to them, their heirs, executors, administrators and assigns respectively, according to the nature of their estate and interests therein, absolutely, or as they should direct, free from incumbrances. And the release also contained covenants from *Charles Hartley*, *William Hartley* and *Thomas Hartley*, for payment to *James Hartley* of the sum of £.1,000 and interest, and to pay and provide for all bills of exchange which *James Hartley* had accepted or should thereafter accept for their accommodation, when they should respectively become due and payable, to indemnify said *James Hartley*, his heirs and assigns therefrom and from all costs, &c. occasioned thereby or by the nonpayment thereof or any part thereof.

1819.

HARTLEY
and others
v.
SMITH.

By indentures of lease and release 13th and 14th November 1809, the release being of three parts and made between *Charles Hartley*, *William Hartley* and *Thomas Hartley* of the first part, *James Hartley* of

1819. the second part, and the *Halifax* bank of the third
 HARTLEY part, all the premises mentioned in the release of 2nd
 and others June 1808 were conveyed to the *Halifax* bank, in
 v. trust to sell the same, and to apply the proceeds of
 SMITH. the sale, in the first place, in satisfaction of *Isaac Lane's* debt, and then in payment of what should be due to themselves in respect of advances made by them to *Charles Hartley, William Hartley and Thomas Hartley*, and to apply the residue according to the trusts of the deed of 2nd June 1808.

The *Halifax* bank and *James Hartley* put up the premises to be sold by auction, in lots, and the defendant became the purchaser of lot 3, consisting of three dwelling houses,

Many objections were taken to the title, and amongst others, because the complainants had not produced satisfactory evidence to show that they had power or authority to contract with the defendant for the sale of the estate and premises. In support of this objection, the defendant insisted upon two points; First, that the deed of the 2nd of June was fraudulent, and altogether void as against the creditors of *Charles Hartley, William Hartley and Thomas Hartley*; and secondly, that it was an act of bankruptcy by *Charles Hartley, William Hartley and Thomas Hartley* apparent upon the face of the deed, of which the defendant had notice, and therefore the plaintiffs could not enter into any contract which might not be defeated by the issuing of a commission of bankrupt. (a) The master being of opinion that

(a) *Lowes v. Lum*, 14 Ves. 547.

the objection to the deed of the 2nd of *June* 1808 was not answered, reported against the title. To this report the plaintiffs filed two exceptions; First, because the said master hath by his report certified that the said plaintiffs cannot make a good title to the estate and premises upon the agreement before him on the 9th objection taken by the said defendant to the said title, in which agreement it was contended by the counsel for the defendant, although not mentioned in the said objections taken to the title, that certain indentures of lease and release bearing date respectively of the 1st and 2nd days of *June* 1808 amounted to an act of bankruptcy by *Charles Hartley, William Hartley and Thomas Hartley*, parties thereto, and that although no commission existed against them, yet that the purchaser could not be protected in the event of any person thereafter taking out a commission. Whereas the plaintiffs contend, that the said indentures do not amount to an act of bankruptcy, but that on the contrary the same were a valid and bona fide conveyance by way of security, and therefore the said master ought to have certified that the said plaintiffs could make a good title to the said premises.—Secondly, because the said master in determining upon the effect of the said indentures of the 1st and 2nd *June* 1808, declined taking into consideration the subsequent deeds, transactions and events between the parties, which subsequent deeds, transactions and events would, if it were necessary, shew that there was no fraud or undue preference contemplated by the parties to those deeds, and because the said plaintiffs can shew that even admitting the indentures in question amounted to an act of bankruptcy, all objections on that account are obviated; wherefore the said plaintiffs except, &c. &c.

1810.

HARTLEY
and others
v.
SMITH.

1819. Mr. Cullen and Mr. Moore, in support of the exceptions.

HARTLEY
and others
v.

SMITH.

It must be admitted that if a trader make an absolute sale of the whole of his effects, it is an act of bankruptcy; but this is not a case of that nature. It is a mortgage of real estate, and of a cotton mill and machinery attached to it; but the stock in trade and the debts are not mentioned in the deed. Where there is a sale of the whole of the property, that circumstance is alone conclusive evidence of a fraudulent intention to defeat creditors; but a sale of part of a trader's effects may be not only free from fraud, but may be very meritorious; it is therefore incumbent on the opposite side to shew that the sale was made with a fraudulent intent; but they have no evidence that the parties intended a fraud, or any evidence except what appears upon the face of the deed itself. The transaction is one of every day's occurrence. The London bankers are in the habit of taking securities precisely of this description from their customers; but it was never before supposed that a trader, by executing such a mortgage to his banker, committed an act of bankruptcy.

Mr. Bell and Mr. Buck for the defendant.

It is quite clear that this deed was executed by Messrs. *Hartleys* with a fraudulent intent to defeat and delay their creditors. It is expressly stipulated and made part of the agreement that they were to be permitted to continue in the possession of the cotton mill, machinery, apparatus, frames and utensils, so long as the bill account between them and *James Hartley* went on prosperously; but if at any time the balance upon that account amounted to £. 500, then

James Hartley was to enter and sweep away the whole of the property. They were to go on trading upon the false credit given to them, as being the apparent owners of the mill and machinery. If they succeeded and were prosperous they were to reap the advantage; but if otherwise, then *James Hartley* was to be indemnified at the expence of those who had been deceived into giving Messrs. *Hartleys* credit, by the secret and fraudulent agreement contained in the deed. One of the points determined in *Twyne's (a)* case was, the donor continued in possession and used them as his own, and by reason thereof he traded and trafficked with others and defrauded and deceived them. So also in *Edwards v. Harben, (b)* the agreement to leave the goods in the possession of the vendor was held to be fraudulent and to make the sale void. But every sale by deed which, under the statute of Elizabeth, *(c)* would be fraudulent against creditors, is, if the party be a trader, an act of bankruptcy. *(d)* It is true we have not evidence to show that it was a sale of all the effects, but the fraudulent intent is sufficiently evident, for it is a sale of the plant and machinery by which the Messrs. *Hartley* carried on their business, and without which they could not continue the manufactory of cotton warps. Lord Mansfield says, *(e)* "Indeed if a man makes
"over so much of his stock in trade as to disable him-
"self from being a trader, this would be fraudulent.
"It would be, as I said in *Compton v. Bedford*, an
"assignment of his solvency."

1810.

HARTLEY
and others
v.
SMITH.

(a) 3 Coke Rep. 80. v. *Temple*, 4 Burr. 2239. *Rust*
(b) 2 T. R. 587. v. *Cooper*, Cowp. 633. *Good-*
(c) 13 Eliz. c. 5. inge, 35. Cullen, B. L. 43.
(d) Com. Dig. Tit. Bankrupt, Cooke, B. L. 6 Ed. 107.
C. 8. *Hassells v. Simpson*, 1 Doug. (e) *Hooper v. Smith*, 1 Black.
92, per Ld. Mansfield. *Alderson* 442.

1810. But supposing it could not be maintained as a general proposition that a deed fraudulent under the statute of Elizabeth is necessarily an act of bankruptcy, yet as it is fraudulent as against creditors, a purchaser cannot be secured against their claims, and therefore no title can be made. In *Stont v. Grubham*, (f) it is said by Lord Coke, "If a man do mortgage his land and yet still continues his possession, no disseisin is wrought by this; and so was *Winnington's* case. If it was an absolute conveyance and a continuance in possession afterwards, this shall be adjudged in law to be fraudulent, for this has the face of fraud. If a man hath any intention to evade out of the statute of Elizabeth, whatsoever he shall say afterwards, will not any ways salve or mend the matter; but the same shall be fraud and be within the statute." Now in the present case the transaction does not profess to be a mortgage. It is an absolute sale to *James Hartley*, with an agreement that the vendors shall continue in possession. But should the court be of opinion that with regard to the conveyance of the real estate the transaction did not fall within the statute of Elizabeth, yet as the sale is clearly fraudulent so far as it relates to the chattels, that will make the deed altogether void; for a deed cannot be good in part and bad in part where the matter is made void by statute (g); though otherwise if it were void by common law.

THE VICE CHANCELLOR:

This is a bill for the specific performance of a contract for the sale of real estates. The master has re-

(f) 2 Bulst. 225.

(g) *Collins v. Blantern*, 2

Wils. 351. Hob. 14. 2 Strange,

744.

ported against the title, upon the ground that the deed of the 2d June 1808, was an act of bankruptcy. (His Honor here read the deed.) The subject of this conveyance was of a mixed nature, consisting partly of freehold estate, and partly of a mill and the machinery and utensils belonging to it; and the master was of opinion, because it was stipulated, that the traders should continue in possession of all the property, including therefore the personal chattels, until default was made in payment to *Isaac Lane* or *James Hartley*, that the execution of the deed was an act of bankruptcy. It does not appear to me to be necessary to decide that point; but I strongly incline to think that no authority will be found to support the master's opinion. The statute of Elizabeth (*h*) expressly excepts deeds made upon good consideration and bona fide; and in the case of *Ryal v. Rowles*, (*i*) where according to the tenor of the deed, the grantor was to remain conditionally in possession, the deed being upon good consideration and bona fide, was not held fraudulent and void, though the assignees were considered entitled to the personal chattels by the 21 Jac. I. In *Worsley v. De Mattos*, (*k*) where also according to the tenor of the deed the grantor was to remain conditionally in possession, the deed was held fraudulent and void, as far as regarded this point, because though made upon good consideration, it appeared from the conduct of the parties not to have been made bona fide. In that case, the deed was also deemed fraudulent, as being an assignment of all the trader's property. In *Cadogan v. Kennett*, (*l*) where the grantor was to remain in possession, the deed being made upon good consideration and bona fide, was not held frau-

1819.

HARTLEY
and others
v.
SMITH.

(*h*) 13 Eliz. c. 5. s. 6.

(*i*) 1 Atk. 165. 1 Ves. 348.

(*k*) 1 Burr. 467.

(*l*) Cowp 432.

1819.

HARTLEY
and others
v.
SMITH.

dulent and void. The inclination of my opinion therefore is, that where the delay of possession of personal chattels, is consistent with the deed, and the deed is made upon good consideration and bona fide, it does not become an act of bankruptcy, by reason of such delay of possession. If, however, the case turned upon this point, I would not bind the purchaser, upon a question of legal title, by my opinion, but would send the case to a court of law.

Another view of this subject has however occurred to me, which appears to me to make the decision of this point now unnecessary. Assuming that such a deed would be valid if made upon good consideration and bona fide, it is plain that the bona fides and consequently the validity of the deed may depend, as in *Worsley v. De Muttos*, upon circumstances of conduct extrinsic the deed. With these circumstances the purchaser has no connection, nor any adequate means of ascertaining their existence. This is not like the case where a grantor, who is himself affected with an equity, can yet give a clear title to an assignee without notice. Here the deed, if not made bona fide, is as much void at law as it is in equity; and an assignee without notice can have no better title than his assignor.

My opinion, therefore, is, that a court of equity ought not to compel this purchaser to accept this title; because assuming the deed not to be fraudulent ex facie, it still may be avoided by circumstances extrinsic, which it is neither in the power of the purchasers or of this court to reach.

Exceptions overruled. The cause being also set down for further directions, the bill was dismissed with costs.

Ex parte READER.—In the Matter of WILLATS. TRIN. TERM, 1819.

THIS was a petition to be at liberty to prove a debt of £.614 12s. 11d. upon certain bills of exchange set forth in the petition, upon all of which the bankrupt's name appeared, either in the character of a drawer, indorser or acceptor.

Held that where A at request of B, and upon the security of a bill of exchange from him for a certain amount, delivers goods to B, and such goods are afterwards partly paid for by C, and then B becomes bankrupt, A can only prove as against the estate of B, the sum remaining due for the goods, and not the full amount of the bill.

The circumstances of the case were as follows :

One *Kearns*, in the year 1815, carried on the business of a cabinet-maker, and *Reader*, the petitioner, that of a timber merchant. Before the month of *November* 1817, and between that month and the month of *April* 1819, various dealings and transactions took place between the petitioner and *Kearns*, respecting the sale to him of goods by the petitioner. In the month of *December* 1817, *Willats*, the bankrupt, was introduced by *Kearns* to *Reader*, who represented that *Kearns* had purchased goods of him to a considerable amount, but that he would not deliver such goods to *Kearns* until some person, on the behalf of *Kearns*, became security for the price of them: and it was further represented to the bankrupt by *Kearns* and *Reader*, that *Kearns* was desirous that a part of the goods so purchased should be then delivered, to the amount in value of the sum of £.208 1s. 0d. and that *Reader* would deliver the same upon *Willats*' security to that amount. *Willats*, upon such representation, agreed with *Reader* that he would become such security, and upon the undertaking of *Reader*,

1819.

Ex parte
READER.—In the
Matter of
WILLATS.

that goods to the full amount should be delivered to *Kearns*, signed and became a party to certain bills of exchange to the amount of £.208 1s. 0d., and delivered them to *Reader*. Shortly after the delivery of these bills, *Willats* agreed with *Reader* to become security for a further part of the goods purchased by *Kearns*, which *Reader* agreed he would deliver to *Kearns* upon *Willats* becoming surety for the same, and *Willats* upon the understanding that *Reader* would deliver the goods, became party to and signed other bills of exchange to the amount of £.409 8s. 11d. which were delivered to *Reader*. At another meeting between *Willats*, *Reader* and *Kearns*, in the month of December 1817, *Willats* again agreed to become security for a further part of the goods which *Reader* agreed to deliver upon *Willats* becoming security, and accordingly he signed bills of exchange to the amount of £.409 8s. 11d. by way of such security, and the bills, with his name upon them, were delivered by him and *Kearns* to *Reader*. About the 31st of Jan. 1818, *Reader* and *Kearns* made a further application to *Willats* to become security for a further sum, *Reader* undertaking and agreeing to deliver to *Kearns* goods to the amount of such last mentioned security, and *Willats* thereupon accepted three bills of exchange for the sum of £.54 each, and at the same time indorsed another bill of exchange for the sum of £.15, which were then delivered to *Reader*. Pursuant to the agreement, *Reader* supplied *Kearns* with goods to the amount of £.932 13s. 5d.; but when *Willats*' bankruptcy took place there was only due from *Kearns* to *Reader* £.393 13s. 7d. in respect of those goods. Under these circumstances *Reader* applied to prove £.614 12s. 11d. the amount of the bills which he then held with the bankrupt's name upon them: but the commissioners rejected the proof, being of opi-

nion that the proof ought not to exceed the sum actually due from *Kearns*.

Mr. *Montagu* in support of the petition.

We are the holders of bills of exchange to the amount of £.614 12s. 11d. upon all of which the bankrupt's name appears, either in the character of drawer, indorser or acceptor. These bills were given to us as collateral security for a debt amounting to £.939 13s. 5d. The law has been clearly settled in the cases of *ex parte King* (a) and *ex parte Crosley*, (b) that the holder of a bill or note, transferred to him by a debtor as a collateral security for his debt, may prove the whole amount of the security under a commission against any of the parties, except the debtor, from whom he received it, notwithstanding the bills or notes may have been only accommodation paper. These cases were doubted by Lord *Roslyn*, (c) but that authority was overruled by the present Lord Chancellor, who in *ex parte Bloxham* (d) says, "I look upon it as settled, that you cannot hold the paper of the bankrupt and prove beyond your actual debt upon it; but that you may have the paper of third persons, those persons being indebted to your debtor in more, and you may prove to the whole amount, not exceeding twenty shillings in the pound upon the original debt." It has also been determined, that the holder may prove the whole amount of the bills even where the original debt has been reduced by payments made previous (e) or subsequent to the bankruptcy of the surety. (f)

1810.

Ex parte
READER.
—In the
Matter of
WILLATS.

(a) Cooke, B. L. 6 Edit. 168.

(b) Ibid. 169.

(c) 5 Ves. 448.

(d) 6 Ves. 450.

(e) *Ex parte Crosley*. Cooke, B. L. 6 Edit. 169.

(f) *Ex parte Martin*, 2 Rose, 87.

1810. In the present case, the debt was £.932 13s. 5d.

Ex parte
READER.

—In the
Matter of
WILLATS.

The bills transferred to us as a security only amount to £.614 12s. 11d., and admitting the debt to have been reduced by payments made previously to *Willats'* bankruptcy, yet upon the authority of these cases which have been cited, the petitioner insists upon his right to avail himself, in point of proof, to the full extent of his security.

Mr. *Heald* and Mr. *Collinson* contra.

We do not dispute the law to be as it is stated by Mr. *Montagu*; but we say that the facts of the present case do not bring it within the authority of the cases cited. The bankrupt became a surety, and himself delivered the bills to the creditor, upon an agreement to which he was a party. In the cases that have been mentioned to the court, the bills were deposited with the creditor by the debtor, in transactions to which the persons whose names appeared upon the bills, and against whose estates the proofs were allowed, were not parties.

THE VICE CHANCELLOR.

It must be admitted, that if the bankrupt at the request of *Kearns*, and without any communication with the petitioner, had put his name to these bills, and *Kearns* had then delivered them to the petitioner, as a security for the goods sold to him, that the petitioner, holding these bills as a collateral security for *Kearns's* debt, would have been entitled to prove the full amount of them against the bankrupt's estate, and to receive dividends on the full proof, until the whole of *Kearns's* debt was paid.—A creditor has always a right to make the most of a property pledged with him by his debtor, and the bills of a third person are in this respect

like other property.—On the other hand, it must be admitted that, in the case put, if *Kearns's* name were upon these bills, and *Kearns* had become bankrupt, as against *Kearns's* estate the petitioner could only prove for the actual debt remaining due to him, and not for the amount of the bills. *Kearns's* name upon these bills would be payment, and not security, and so long as they were in the hands of the petitioner, would represent against him, only such part of the price of the goods as remained unsatisfied. The question is, how these admitted principles bear upon the actual circumstances of this case.

1819.

Ex parte
READER.

—In the
Matter of
WILLATS.

The bankrupt's bills here are not given to *Kearns*, and handed over by him to the petitioner as a security for *Kearns's* debt to him.—The transaction is immediate between the bankrupt and the petitioner—and the bankrupt gives these bills to the petitioner in payment of goods to the same amount delivered by the petitioner to *Kearns*.—If given in payment of goods delivered by the petitioner to the bankrupt, it is clear that the petitioner could only prove against the estate of the bankrupt the actual sum due, and not the amount of the bills; and I can find no distinction in principle between a bill given by the bankrupt to the petitioner for goods delivered by the petitioner to the bankrupt, and a bill given by the bankrupt to the petitioner for goods delivered by the petitioner to *Kearns* at the request of the bankrupt.—In both cases there is the same immediate contract between the bankrupt and the petitioner, and the bills are equally payment for the goods—and to the extent in which *Kearns* had advanced the price of the goods, the bills are satisfied.—

Petition dismissed with costs.

TRIN. TERM, *Ex parte* HEATON,—In the Matter of MOXON,
1819.

Where some of the members of a firm are trustees of funds which they misapply, by making use of them for partnership purposes; if such misapplication be with the knowledge of the other members of the firm, the cestuique trusts may prove against the joint estate. *MOXON* and his two sons carried on business together in partnership. The sons were trustees named in a will for the sale of certain real estates. They sold the estates, and instead of applying the monies arising from the sales according to the trusts of the will, they appropriated them to partnership purposes. A commission of bankrupt issued against *Moxon* and his two sons, and it was admitted that there was not any separate estate. This was a petition on behalf of the cestuique trusts, who were infants, by their father, to prove against the joint estate, the amount of the monies so appropriated by the sons.

Mr. *Rose* for the petition.

This application is founded upon the petition in *ex parte Moody* in the matter of *Warne*, (*a*) where an executor and trustee having committed a devastavit, it was held that he himself ought not to be permitted to prove against his own estate, and liberty was given to a legatee, on behalf of himself and others, to prove, with a direction that the dividends should be paid into the Bank, in trust, in the matter. In the present case there is no separate estate; but if there were, the infants would have a right to elect whether they would go against the joint or separate estate. In *ex parte Watson*, (*b*) where an administratrix had committed

(*a*) 2 Rose, B. C. 413.

(*b*) 2 Ves. & B. 414.

a breach of trust, by continuing her husband's assets in his partnership trade, it was contended that she alone was liable, and that the children had no remedy against the joint estate; but the Lord Chancellor allowed the proof.

1819.

Ex parte
HEATON.
—In the
Matter of
MOXON.

The VICE CHANCELLOR.

I do not think infancy in the least varies the case; for the principle is, that a cestuique trust, whether he be an infant or an adult person, may resort for payment either to the actual or to the implied trustee. In that case of *Watson*, the partners knew that a certain proportion of the funds belonged to the children. The Lord Chancellor states that as the ground of his decision. He says, they had possessed the property of the infants under circumstances raising a clear assumption. Those who receive trust property from a trustee, in breach of his trust, become themselves trustees, if they have notice of the trust. If the monies arising from the sale of these trust estates were applied to the partnership purposes with the knowledge of *Moxon*, the father, the firm would become implied trustees, and then the cestuique trusts might proceed either against the sons, as actual trustees, or against the firm, as implied trustees; but there is no evidence that the funds were so appropriated with the knowledge of the father. I shall therefore direct an inquiry as to that fact.

Inquiry directed, whether the monies were employed for the use of the partnership trade, with the knowledge of the father that they were trust funds.

TRIN. TERM, *Ex parte* HEWITT.—In the Matter of MORRIS.
1819.

It is of course upon an ex parte application to have an order to tax a solicitor's bill. If the solicitor wish to modify or discharge the order, he must apply to the court for that purpose.

THIS was an application to discharge an order for irregularity, upon the ground that it had been obtained ex parte, for the taxation of a solicitor's bill, after he had commenced an action at law to recover the amount.

The VICE CHANCELLOR was of opinion, upon the opening of the petition, that there was no irregularity in the order, and that it was the usual practice to take such orders upon ex parte applications, leaving it to the solicitor to discharge or modify the order by a specific application. His Honor this day said he had inquired of Mr. *Croft*, the register, who informed him that the uniform practice was to order a solicitor's bill to be taxed as of course, and if there were any special circumstances in the case, the solicitor might make a special application to the court to modify or discharge the order.

Mr. *Agar* and Mr. *Montagu* for the petition.

Mr. *Bell* opposed it.

Ex parte STEVENS.—In the Matter of AUBERT. LINC. INN,
Aug. 7th,
1819.

THIS was a petition to stay the certificate and to supersede the commission, on the ground of its being fraudulent and concerted. The petition was dismissed; and the only question was as to the costs.

Where a petition to stay a certificate fails, it is not of course that the petitioner should be ordered to pay the costs.

Mr. *Montagu* insisted that when a petition to stay a certificate failed, it was of course that the petitioner should pay the costs.

Mr. *Bell* and Mr. *Maddock* for the petition, said that rule did not apply where the object of the petition was to charge the bankrupt with being privy to an abuse of the process of the great seal, and that where a case afforded a sufficient suspicion of collusion, that would induce the court not to give costs. *Ex parte Gardner. (a)*

The VICE CHANCELLOR was of opinion the facts of the case were not such as to call upon the court to visit the petitioner with costs. The petition was therefore dismissed without costs.

(a) 1 Ves. & B. 45.

LINC. INN, *Ex parte* HOSSACK.—In the Matter of CLIFFE.
9 Aug. 1819.

If a creditor, as an additional security for his debt, take the bankrupt's acceptances, it is his duty, when he proves the debt, to state that fact to the commissioners. Where a creditor had not done so, the proof was ordered to be expunged, with liberty for him to go again before the commissioners and tender his proof.

THIS was a petition to expunge the proof of a debt made by one *Mitchell*, who at the second public meeting which took place on the 3rd day of *February* 1818, attended and proved a debt of £.583 10s. 11d. for goods sold, and also for money lent, and interest thereon, for which *Mitchell* stated that he had not received any security whatever. On the 2nd of *April* 1818, the petitioner, one of the assignees, caused *Mitchell* to be examined on oath before the commissioners as to the debt, when he stated that he had received the following acceptances of the bankrupt as security for his debt.

Bill of exchange drawn by the said £. s. d.					
<i>Mitchell</i> upon the said bankrupt, due					
<i>January</i> 18, 1818	-	-	-	-	62 0 0
Ditto	-	-	due <i>February</i> 17	-	248 6 6
Ditto	-	-	ditto ditto 25	-	164 10 6
Ditto	-	-	ditto <i>March</i> 4	-	558 10 0
Ditto	-	-	ditto <i>April</i> 4	-	242 10 0

Mitchell also stated, that all the bills of exchange had been taken up by him on the days on which they severally became due, except the bill of exchange which fell due on the 4th of *April*, for which *Mitchell* stated that he had given his acceptance. It was afterwards discovered that one of the bills, viz. that for £. 164 10s. 6d. had not been taken up, as stated by him, but was then in the hands of a holder who had applied to prove it under the commission. The bill

CASES IN BANKRUPTCY.

891

for £. 251 10s. 0d. and also the bill for £. 242 10s. 0d. which fell due on the 4th of *April*, were also admitted by *Mitchell* to have been outstanding, in the hands of third persons, at the time that he proved his debt.

1819.

Ex parte
Hossack.
—In the
Matter of
CLIFFE.

The petitioner prayed that the debt so proved might be expunged, or be reduced to such sum as was actually due and proveable under the commission, and that in the mean time the payment of the dividend might be stayed, &c.

Mr. Heald and *Mr. Montagu* for the petition.

It is the duty of a creditor, when he applies to prove his debt, to state what securities he has, and to produce them, if they are in his power. If the securities consist of bills, and he states that any of them are lost, he must indemnify the estate and the bankrupt against any claim by the holders of such bills. (a) Here the creditor has no debt. He has parted with the securities to persons from whom he has received a valuable consideration.

Mr. Roots, on the other side, argued, that it was not necessary for *Mitchell* to give up the bills, as they were merely the bankrupt's own acceptances, and were not securities that could be made available against third persons, and he would himself be obliged to take them up in consequence of the failure of the acceptor.

The VICE CHANCELLOR.

The creditor in this case proved for goods sold and

(a) *Ex parte Greenway*, 6 Ves. 812.

1819.

Ex parte
HOSSACK.
—In the
Matter of
CLIFFE.

money lent, and though he had taken the bankrupt's acceptances in payment of the debt, he concealed that fact from the commissioners, and that the acceptances were then outstanding. His counsel now says, that the bills were not securities, and that it was not necessary for him to disclose the fact to the commissioners. I am not of that opinion; for by concealing the bills he was enabled to prove himself for the full amount of his debt, leaving it to the holders afterwards to come in and prove upon the bills, and thus improperly exposing the estate to a double proof. He now pretends that when he made the proof he had quite forgotten the securities; but it is very difficult to give full credit to that statement; for when he came to be examined on the 2nd of *April*, he then remembered that he had received the bills. Upon that examination, he deposed that all the bills, except one, had been taken up by him, which now appears to have been an inaccuracy. He also said, that he had protected the estate against the bill which would fall due on the 8th of *April*, by giving his acceptance; but if his acceptance were given it was no protection, as the holder applied to prove that bill under the commission. Under these circumstances, I shall direct the proof to be expunged, with liberty for *Mitchell* to go before the commissioners to make what proof he can; and he must pay the costs of this petition. If there had not been these special circumstances of suspicion, which make it fit that the assignees should again have an opportunity fully to examine into the debt, I would have permitted the proof to stand, though improperly made at the time, upon delivery of all the bills.

Ex parte BURY.—In the Matter of MATHER.

LINC. INN,
9 Aug. 1819.

IN this case the affidavit in support of the petition was filed after the day for which the petition was answered; but the respondents had filed affidavits in answer.

If a respondent knowing that the affidavits in support of the petition are filed after the petition day, answer them, he thereby waives the objection to the irregularity.

Mr. *Montagu* objected to the affidavits in support of the petition being read.

Mr. *Cullen* and Mr. *Heald* contra.

THE VICE CHANCELLOR.

This case is very different from the last: (*a*) you had notice of the time when the affidavits were filed, and by answering them waived the objection.

The general order of the 12 August 1809 held not to be complied with by the solicitor authenticating the signature of the petitioner without attesting it.

Mr. *Montagu*. There is another objection in point of form to this petition. It was not attested, as required by the general order. (*b*) The signature only purports to be that of the petitioner, "authenticated by *Thomas Leigh*," solicitor to the petitioner, on the petition.

Mr. *Cullen* contra. That is quite sufficient, and so it was held by the Lord Chancellor in *ex parte Titley*. (*c*)

THE VICE CHANCELLOR.

The language of the general order is, that the "signature of each person signing as a petitioner shall be at-

(*a*) See the next case.

(*b*) 12th of August, 1809.

(*c*) 2 Rose B. C. p. 83.

1819. —
Ex parte
 BURY.
 —In the
 Matter of
 MATHER.

“ tested by the solicitor actually presenting the petition,
 “ or by some person who shall state himself in his at-
 “ testation to be attorney, solicitor, or agent of the
 “ party signing in the matter of the petition.” Now
 attestation is a legal expression, and has in courts of
 law a certain definite meaning attached to it. Authen-
 tication is not a technical definite word, nor has it
 the same meaning.—I think the Lord Chancellor’s in-
 tention must have been to relieve against the mistake
 in that particular case, and not to establish as a general
 rule that authentication was equivalent to attestation.
 I am unwilling however to dismiss the petition after
 the authority cited. Let the petition stand over till
 the next petition-day, the petitioner paying the costs
 of the day.

LINC. INN, *Ex parte* PEEL.—In the Matter of FRENCH.
 9 Aug. 1819.

Affidavits in
 support of the
 petition filed
 after the peti-
 tion day cannot
 be read.

In such a
 case the petition
 was permitted
 to stand over
 till the next day
 of petitions,
 that the respon-
 dent might an-
 swer the affida-
 vits, the peti-
 tioner paying
 the costs of the
 day.

THE respondent objected to the affidavits in support
 of this petition being read, on the ground of their not
 being filed in time. It appeared the petition was left
 with the Lord Chancellor in *April*, and was answered
 for the next day of petitions, which was in *May*. The
 affidavits in support of it were not filed till after that
 day. No affidavit was filed in answer, and the solic-
 itor for the respondent stated to the court, he consi-
 dered the practice to be settled, that affidavits filed
 after the petition-day, could not be read; and there-
 fore he had advised his client not to file any in answer.

The VICE CHANCELLOR was of opinion, under these
 circumstances, that the affidavits could not then be

read; but he permitted the petition to stand over till the next day of petitions, that the respondent might answer the affidavits, the petitioner paying the costs of the day.

1819.

Ex parte
PEEL.

—In the
Matter of
FRENCH.

Mr. Cullen and Mr. Montagu for the petition.

Mr. Bell contra.



Ex parte SMITH.—In the Matter of DANNEK.

LINC. INN,
10 August,
1819.

IN answer to an objection taken by Mr. Montagu to the reading of the affidavits in support of the petition, they being irregularly filed;

Where affidavits in support of a petition are irregularly filed, a respondent answering them does not waive the objection to their being read, if he have not notice of the irregularity.

Mr. Bell contended, that the respondent had waived the objection by filing affidavits in answer. To this it was replied, that the affidavits answered the petition, and not the affidavits filed in support of it.

The VICE CHANCELLOR was of opinion, that the answering of an irregular affidavit, the respondent having notice of the irregularity, was a waiver of the objection, but otherwise if there were not notice. The petition therefore was ordered to stand over till the next day of petitions.

LINC. INN. *Ex parte* ASTELL.—In the Matter of STILL.
11 August,
1819.

If when a petition is called the petitioner do not appear, the respondent must produce an office copy of the affidavit of service before the rising of the court, to entitle him to his costs.

THIS petition had the day before been struck out of the paper, the petitioner not appearing when it was called. The respondent asked for his costs, which his Honor refused to give, unless an affidavit of service were produced before the rising of the court. Mr. Rose now applied for the costs, and stated that the respondent had the day before gone to the office, but found it shut, and was therefore unable to procure an office copy of the affidavit before the rising of the court.

The VICE CHANCELLOR being of opinion that it was incumbent upon the respondent to have provided himself with an office copy of the affidavit on the day the petition was called on, refused the application.

LINC. INN. *Ex parte* NORTH.—In the Matter of COLMAN.
12 August,
1819.

An office copy is the only evidence the court will admit of the filing of the affidavit.

UPON a statement by Mr. *Montagu*, that there was an affidavit of service of the petition filed, Mr. *Bickersteth* asked for the office copy, which he contended was the only evidence the court could admit of the filing of the affidavit, and of this opinion was the VICE CHANCELLOR; but he gave the party leave to produce an office copy before the rising of the court.

Ex parte ANDERSON—In the Matter of
GILCHRIST.

LINC. INN,
10 August,
1819.

A COMMISSION of bankrupt, bearing date the 26th day of *January* 1819, was awarded and issued against *George Gilchrist* and *John Macquay Gilchrist*, and they were declared bankrupts, and the petitioners were duly elected and appointed assignees. Soon after the issuing of the commission, one *Robert Preston*, of *Liverpool*, took possession of a cargo of merchandize, the property of the bankrupts; and the petitioners being desirous of knowing what claim he could set up to the cargo, or by what authority he seized it, caused him to be duly summoned to appear before the commissioners, in order to be examined concerning the same. On the 22nd day of *April*, *Robert Preston* appeared before the commissioners, in pursuance of their summons to him for that purpose, and submitted to be examined by them, but stated that he could not then procure the attendance of his attorney *George Orred*, and requested the commissioners to adjourn his examination until the 24th of *April*, when he would again attend and bring his attorney with him; to which proposal the commissioners consented, and the examination of *Robert Preston* was then adjourned to the 25th of *April*. On the 24th of *April* *Robert Preston* attended, and requested the commissioners not to proceed on his examination until the arrival of his attorney, who had promised to attend on his behalf. About one o'clock, and after the commissioners had been present together for more than an hour, *Robert Preston* having been

The commissioners under the stat. 1 Jac. I. c. 15. s. 10. have authority to examine persons supposed to have, or detain a part of the bankrupt's estate, although such persons do not claim to be interested therein.

1819. waiting there all the time, his attorney came into the room, and called *Preston* out, and immediately returned alone into the room, saying, "that the commissioners had no right to examine Mr. *Preston*, and that he should not be examined by them, and that he had sent him away, and that he would not return."

Ex parte
ANDERSON.
—In the
Matter of
GILCHRIST.

The petition prayed that his Lordship would be pleased to order and direct that the said *Robert Preston* might forthwith attend a meeting of the major part of the said commissioners in the said commission named, to be appointed for that purpose, then and there to be examined by them touching the discovery and disclosure of the said bankrupt's estate and effects, and other matters relating thereto, and that the costs of this petition and of the said meeting might be paid and borne by the said *Robert Preston, &c.*

It appeared by a memorandum on the proceedings made by the commissioners, they were of opinion that they had not the power to compel *Preston* to be examined.

Mr. *Bell* and Mr. *Rose*. There is a preliminary objection to this petition. It was not necessary for the petitioners to come here, as the act gives authority to the commissioners to examine persons touching bankrupts' estates.

Mr. *Cullen* contra. *Preston* disclaims all beneficial interest in the property, and the commissioners said that the case was not within the statute, and refused to act: it therefore became necessary that this petition should be presented.

CASES IN BANKRUPTCY.

399

The VICE CHANCELLOR.

1819.

Mr. *Preston* is charged with having or detaining a part of the bankrupt's estate. The clause in the statute of James surely gives the commissioners the power to examine him. (His honor read the section.)

Ex parte
ANDERSON.
—In the
Matter of
GILCHRIST.

(a) Mr. *Cullen* contends, that in order to bring a person within the statute, it is necessary that he should claim a beneficial interest in the property. But I find no ground for such qualification. The mere detention of the property, whatever may be the motive, is of itself sufficient to give the commissioners jurisdiction: but as they have made that memorandum, I cannot dismiss the petition. It must go back to the commissioners, and the petition must stand over till the next day of petitions.

Ex parte MAC DONNELL.—In the Matter of
MAC DONNELL.

LINC. INN,
10 August,
1819.

PREVIOUS to their bankruptcy, the bankrupts *Myles Mac Donnell*, *John Mac Donnell*, and *John Bushell*, carried on trade in copartnership together in the city of London, as general merchants, under the firm of *T. and J. Mac Donnell* and *T. Bushell*. The petitioners and *John Mac Donnell* were also engaged in business in partnership together at Lisbon, under act according to the best of his discretion in the settlement of the affairs. The creditor accordingly went to Paris, and entered into a composition for the debt with the Paris house. After the departure of the creditor from England, and previous to the composition, a commission of bankrupt issued against the London house, of which fact the parties to the composition were ignorant. Held that the bankruptcy did not determine the authority.

A London house
guarantied cer-
tain payments
to be made by a
Paris house
The solvency of
the Paris house
becoming
doubtful, the
London house
duly authorized
the creditor to

(a) 1 Jac. I. c. 15. sec. 10.

1819. the firm of Brothers *Mac Donnell* and Co. On the 18th day of *November*, 1819, *Myles Mac Donnell*, *John Mac Donnell*, and *John Bushell* suspended their payments, and on the 15th day of *December* following, a joint commission of bankrupt issued against them as copartners, and they were thereupon duly found and declared bankrupts, and the usual assignment made of their estate and effects to the assignees chosen under the commission. The house of *M. and J. Mac Donnell* and *J. Bushell*, prior to their bankruptcy, had considerable dealings with the house of *Desprez, Huard* and *Comartin* of Paris, and through the introduction of the bankrupts the petitioners' house of Brothers *Mac Donnell* and Co. had likewise some dealing with that house. About the months of *August* and *September* 1818, the petitioners' house of Brothers *Mac Donnell* and Co. received an order from *M. and J. Mac Donnell* and *J. Bushell* to ship for account of Messrs. *Desprez, Huard* and *Comartin* to Rouen and Havre, a quantity of cocoa, and to value upon *M. and J. Mac Donnell* and *J. Bushell* for part of the invoice amount.

Ex parte
M'DONNELL.
— In the
Matter of
M'DONNELL,

The petitioners' house of Brothers *Mac Donnell* and Co. accordingly shipped the goods from Lisbon, and in *September* and *October* last, drew upon *M. and J. Mac Donnell* and *J. Bushell* in part reimbursement four several bills of exchange at different dates, amounting in the whole to the sum of £. 2,059 14s. 6d. which were duly accepted by *M. and J. Mac Donnell* and *J. Bushell* on presentation. Two of the bills, amounting to the sum of £. 1,559 14s. 6d, were negotiated by the petitioners, and had been proved by their respective holders under the commission against *M. and J. Mac Donnell* and *J. Bushell*, but the remaining two bills, amounting to £. 500, were at the date of the

commission and still remained in the hands of the petitioners. In the month of *October* last, the house of *M. and J. Mac Donnell and J. Bushell* proposed to Messrs. *Desprez, Huard and Comartin* to draw upon the petitioners' house of *Brothers Mac Donnell and Co.* at Lisbon, for the sum of £.2,120 at 3 months, upon an understanding that a provision for the drafts should be sent to the petitioners before they fell due. The house of *M. and J. Mac Donnell and J. Bushell* advised the petitioners of this intended operation, and gave their guarantee to the petitioners, in their firm of *Brothers Mac Donnell and Co.* that Messrs. *Desprez, Huard and Comartin* should punctually provide for the bills so to be drawn, or otherwise that they, *M. and J. Mac Donnell and J. Bushell* would provide for the same. Upon the faith of the guarantee the house of *Brothers Mac Donnell and Co.* accepted the drafts of Messrs. *Desprez, Huard and Comartin* for the sum of £.2,120, which drafts were dated at Paris, the 17th day of *October* last, and were made payable 3 months after date to the order of Messrs. *Desprez, Huard and Comartin*. In the beginning of the month of *November*, when the petitioner, *Bartholomew Mac Donnell*, was in Ireland, he received a communication from the house of *M. and J. Mac Donnell and J. Bushell*, recommending him to lose no time in proceeding to Paris to look after the dependencies of the house of *Brothers Mac Donnell and Co.* with the said Messrs. *Desprez, Huard and Comartin*, in which also they, *M. and J. Mac Donnell and J. Bushell*, were interested, as guarantees to the house of *Brothers Mac Donnell and Co.* The petitioner, *Bartholomew Mac Donnell*, upon receipt of this communication, immediately left Ireland, and passed through London to consult with the firm of *M. and J. Mac Donnell and J. Bushell*, and to receive such information and instructions as

1812.

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Ex parte
M'DONNELL.
—In the
Matter of
M'DONNELL.

1819.

Ex parte
M'DONNELL.
 —In the
 Matter of
M'DONNELL.

they had to give, and he received full authority from them, verbally, to act according to his discretion in the settlement of the affairs which interested both houses. The petitioner, *Bartholomew Mac Donnell*, left London on the 16th of *November*, two days before the stoppage of the house of *T. and J. Mac Donnell* and *J. Bushell*, and arrived at Paris on or about the 20th of *November*. Messrs. *Desprez, Huard* and *Comartin* stopped payment on the 24th of *November*, before the petitioner, *Bartholomew Mac Donnell*, could effect any settlement with them. The petitioner, *Bartholomew Mac Donnell*, constantly corresponded with the firm of *T. and J. Mac Donnell* and *J. Bushell* in London, the whole time he was in Paris, and kept them advised of all his proceedings and negotiations with Messrs. *Desprez, Huard* and *Comartin*, and the trustees who were appointed to manage their concerns after they stopt payment, and among other things of a proposal made on the part of the house of *Desprez, Huard* and *Comartin* to pay £.60 per cent, in full discharge of their several debts and engagements, by four equal instalments. On the 2nd *January*, *Bartholomew Mac Donnell*, considering himself under the circumstances authorized so to do by the house of *M. and J. Mac Donnell* and *J. Bushell*, agreed to the proposal on the part of the house of *Desprez, Huard* and *Comartin*, to accept £.60 per cent. payable by four equal instalments, in the notes of the said *Desprez, Huard* and *Comartin*, as a composition in full from *Desprez, Huard* and *Comartin*, for the sum of £.2059 14s. 6d. for accepted bills, and also for the drafts of *Desprez, Huard* and *Comartin*, for a sum amounting to £.2,120 British sterling, guaranteed by the house of *M. and J. Mac Donnell* and *J. Bushell*. In pursuance of the agreement, the petitioner, *B. Mac Donnell*, received in payment of the said £.60 per cent. the notes

of the said *Desprez, Huard and Comartin*, amounting to 40 per cent. upon the two sums of £.2,059 14s. 6d. and £.2,120, payable by four equal instalments, the last of which would become due on the 1st of July 1820, and he thereupon signed a discharge to *Desprez, Huard and Comartin* for the said two sums. Messrs. *Desprez, Huard and Comartin* retained 20 per cent. out of the said 60 per cent. in respect of *John Mac Donnell's* share in the 60 per cent. in respect of a debt due to *Desprez, Huard and Comartin* from the house of *M. and J. Mac Donnell and J. Bushell*, (he being one of them) and which by the laws of France they were entitled to do. The petitioner, *B. Mac Donnell*, in accepting the composition and giving such receipt or discharge, considered himself as acting according to the best of his discretion and judgment, and for the benefit of the house of *M. and J. Mac Donnell and J. Bushell*, and without prejudice to the claims of the firm of brothers *Mac Donnell and Co.* upon the estates of the bankrupts, it being important, in the peculiar relation in which the bankrupts then stood with respect to Messrs. *Desprez, Huard and Comartin* (the said *John Mac Donnell* being one of the said bankrupts), that an immediate decision should be come to without waiting for a formal authority from the assignees of the bankrupts, who had not then been chosen. The petitioners had applied on behalf of the firm of brothers *Mac Donnell and Co.* to prove under the commission the bills in their hands, amounting to £.500, being two of the four bills amounting to £.2,059 14s. 6d., and also the sum of £.2,120 guaranteed by the bankrupts, excepting as securities in their hands the composition notes of *Desprez, Huard and Comartin*; but the commissioners refused to admit the proof, as they doubted whether, by accepting the composition from *Desprez, Huard and Comartin*,

1819.

Ex parte
M'DONNELL.
—In the
Matter of
M'DONNELL.

1819. without the express consent of the bankrupts' assignees, the petitioners' firm had not discharged the estate of the bankrupts.

Es parte
McDONNELL.

—In the
Matter of
McDONNELL.

The petition prayed that the petitioners might be at liberty, on the part of the house of brothers *Mac Donnell* and Co., to prove under the commission, the two sums of £.500 and £.2,620, excepting as securities in their hands the instalment notes of Messrs. *Desprez, Huard* and *Comartin*, the petitioners being willing that the assignees should retain all dividends beyond twenty shillings in the pound upon the debt of Messrs. *Desprez, Huard* and *Comartin*, if they should pay all their instalments, and being willing also to give security to the satisfaction of the assignees to return any sum they might receive above twenty shillings in the pound, in case the instalment notes should not be paid till after the receipt of any dividends which might be payable out of the estate of the bankrupts.

Mr. *Rose* for the petition, contended that as the house of *M. and J. Mac Donnell* and Co. if they had remained solvent, would have been bound by the arrangement made by *B. Mac Donnell* with the house of *Desprez* and Co. so their assignees were equally bound by the acts of an agent duly authorized previous to the bankruptcy to act according to the best of his judgment for the common advantage of all parties.

Mr. *Bell* for the respondents, argued that as the creditor had thought fit to compound with the debtor without the consent of the sureties, that put an end to their liabilities under the guarantee. That with respect to *B. Mac Donnell* being an agent for the assignees, it was impossible he could be considered in that light, as he was an agent for the house of *M. Mac*

Donnell and Co. but when he made the arrangement with the French house, the bankruptcy had put an end to the firm by whom he was employed, and consequently no subsequent act of his could be binding upon the assignees.

1819.

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Ex parte
M'DONNELL.
—In the
Matter of
M'DONNELL.

The VICE CHANCELLOR.

The short point in this case is, that a creditor goes over to Paris with the consent and approbation of the surety, to make the best terms he can with the principal debtor. Being so authorized, he enters into a compromise of the debt; but it now appears that, previous to this arrangement, the sureties had become bankrupts; and it is contended, on behalf of their assignees, that the bankruptcy determined the authority given to the creditor, and that the compromise which he effected in confidence on that authority, and as it is alledged, without notice of the bankruptcy, has discharged the estate of the sureties from all liability.—There was, I remember, a case before Lord *Kenyon*, where a power of attorney was sent out to India, and the attorney after the death of the principal, which happened in this country, acted under that power without notice of his death. Lord *Kenyon*, under these circumstances, supported the acts of the attorney. I think that is an authority upon which I may decide the present case, if *Mac Donnell* had no notice of the bankruptcy. Refer it to the master, to inquire whether on the day when the arrangement was made, *B. Mac Donnell* had notice of the bankruptcy.

LINC. INN,
12 August,
1819.

Ex parte BROCKLISS.—In the Matter of
BLOCKLISS.

Where it was agreed between a mother and a son that she should join in conveying her life interest in an estate to a purchaser, the son undertaking in consideration thereof, to secure to her an annuity, but after the execution of the conveyance and before the annuity was secured, the son became bankrupt; held that the mother was not entitled to prove for the value of her life estate, but only for the value of the annuity and the arrears at the date of the bankruptcy.

BY the marriage settlement of the bankrupt's father and mother, a certain freehold estate was conveyed unto trustees to the use of the father for life, with remainder to the use of the mother, the petitioner, for her life, with remainder to the use of all and every or such one or more of the child or children of the body of the petitioner, and of his, her and their heirs, executors, administrators or assigns, for such estate or estates, term or terms, or number of years, and under and subject to such use and uses, charge and charges, trust and trusts, provisoes, limitations and appointments, and at such time or times, and in such share or shares, proportions, and manner, as the father by his last will and testament in writing or by any writing purporting to be his last will and testament, should give, demise, direct, limit or appoint, with divers remainders over in default of such gift, direction, limitation or appointment. There was issue of such marriage four children, namely *Sarah Brockliss* and *Ann Brockliss*, both of whom died in the lifetime of the father, and also the bankrupt, and *Rhoda Brockliss*. The father duly made and published his last will and testament in writing, executed conformable to the power of appointment reserved by the indenture of settlement, whereby he appointed all the premises mentioned and comprized in the said recited indentures, unto the bankrupt, his heirs and assigns for ever, subject and charged with the payment of the sum of £.1000 to his daughter,

Rhoda Brockliss, her executors, administrators and assigns, at her age of twenty-one years, with interest in the mean time from the death of the petitioner. Upon the death of his father, the bankrupt requested the petitioner to join with him in conveying the said premises to a purchaser, the better to enable him to effect an advantageous sale thereof, and thereupon an agreement was entered into between the petitioner and the bankrupt, whereby, in consideration of his undertaking to grant to the petitioner an annuity of £.30 per year, to commence from *Michaelmas* 1819, and to be paid quarterly, and to secure the regular payment thereof to the petitioner for her life, the petitioner consented to give up her life estate in the premises, and to join with the bankrupt in conveying the same to a purchaser; but the terms of such agreement were never reduced into writing, nor was there at the time of such agreement or afterwards any express understanding between the petitioner and the bankrupt, how or in what manner in particular such annuity should be secured. The bankrupt, shortly after he had entered into the agreement, contracted with several persons for the sale to them of the premises in parcels, the several purchase monies making in the whole £.1,600. The premises were shortly afterwards conveyed to the purchasers, and the whole of the purchase money was paid to the bankrupt. When the petitioner joined in conveying her life estate in the said premises, she was of the age of fifty-five years, and her life estate in the premises was valued at £.600. The bankrupt did not at the time of the sale execute to the petitioner any written security for the payment of the annuity, but from time to time after such sales, he promised the petitioner to execute such instruments in writing as should be deemed requisite and neces-

1810.

Ex parte
BROCKLISS.
—In the
Matter of
BROCKLISS.

1819. sary; and he also promised the solicitor of the
Ex parte petitioner that he would secure the regular payment
BROCKLISS. of the annuity, but he became bankrupt without
—In the having executed any security. At the time of the
Matter of issuing of the commission, the bankrupt was indebted
BROCKLISS. to the petitioner for two years arrears of the annuity,
commencing from *Michaelmas* 1816.

On the 15th of *June* 1819, the petitioner attended a meeting of the major part of the commissioners acting under the said commission, and applied to them to prove the value of her life interest in the said annuity, and the arrears thereof, but such commissioners declined to permit the petitioner to make such proof, without the order of his Lordship, by reason that the petitioner was unable to produce any written security for the payment of the said annuity. The petitioner insisted the annuity was to be considered as if the same had been actually charged on the hereditaments and premises comprised in the settlement, or as if the payment thereof had been actually secured by the bankrupt to the petitioner by a proper deed duly executed for that purpose, and that the petitioner was entitled to prove a debt under the commission for so much as should be adjudged the value of the annuity, or else for so much of the purchase money received by the bankrupt for the sale of the hereditaments as should be adjudged due to her in respect of her life estate.

The petition prayed, that it might be referred to the commissioners to settle the value of the petitioner's life interest in the annuity, or otherwise her life interest in the hereditaments and premises at the time when the sale thereof took place; and that the petitioner might be admitted as a creditor under the

commission for the arrears of her annuity, as also for so much money as should be found and considered to have been the value of the petitioner's life estate and interest in the said hereditaments at the time of the sale.

1819.

Ex parte
BROCKLIS.
—In the
Matter of
BROCKLIS.

When the petition came on to be heard, it was admitted that the commissioners ought to have allowed the bankrupt's mother to have proved, and the only question was as to the extent of the proof.

Mr. *Harrison*, on behalf of the assignees, contended that the proof ought to be limited to the value of the annuity, and the arrears at the date of the bankruptcy.

Mr. *Buck*, for the petitioner, insisted that as the provisions of the annuity act had not been complied with, the annuity was void, and therefore its value estimated at the date of the bankruptcy ought not to be taken for the measure of the proof. That it had been determined at law, where the deeds for securing an annuity were void, the grantee might maintain an action against the grantor, for the consideration paid, (a) and even where the instruments were not set aside till after the bankrupt had obtained his certificate, it had been held that the consideration was proveable under the commission against the grantor. (b) That in this case the consideration was the value of the mother's life estate in the premises, which she had joined in conveying to a purchaser; and if the son had not become a bankrupt and had refused to execute a proper annuity deed according to the agreement, she might have recovered in an action against him,

(a) *Shove v. Webb*, 1 T. R. 732. (b) *Walker v. Lascurry*, 6 Esp. 98.

1819. the value of her life estate; and as by his becoming a
Es parte bankrupt he had put it out of his power to execute
 BROCKLISS. such a deed, she was entitled to prove under his com-
 —In the mission for the full value of that interest.
 Matter of
 BROCKLISS.

The VICE CHANCELLOR.

I assent to the law as it has been laid down in the cases which were cited at the bar; but the principle does not apply to the present case. This lady acquired by her contract with her son an equitable title to the annuity stipulated for, and if acting from motives of affection towards her son, she accepted an inadequate consideration, I cannot relieve her from her contract.—She could make no claim against her son beyond the annuity, and she can make no further claim against the creditors.

Let it be referred to the commissioners to set a value upon the annuity at the bankruptcy, and let her prove for the sum so to be fixed, and for the arrears of the annuity; and she must have the costs of this application.

Ex parte EDWARDS.—In the Matter of
RIDDALL.

LINC. INN.
11 August,
1819.

The VICE CHANCELLOR.

THE object of this petition is to set aside the choice of assignees, upon the ground that the commissioners, through error of judgment, prevented the petitioner from voting in the choice. Generally speaking, the error of the commissioners in admitting or rejecting the proof of debts, will not vitiate the choice, if no corrupt motives are fixed upon them, and their judgment be not surprised by fraud and contrivance; but the circumstances of this case are very special. There are only three creditors,—the petitioner, for £. 10,000, and two others, both of whose debts only amount to £. 172, and the petitioner, through the error of the commissioners, who mistakingly rejected a power of attorney, was prevented from voting. Under these circumstances, I think a new choice of assignees ought to be made; but I shall direct the petitioner to indemnify the estate against all costs.

Where the commissioner's had improperly rejected the petitioners proof to a very large amount, whereby two creditors for comparatively trifling sums were enabled to choose the assignees, a new choice was directed, the petitioner indemnifying the estate against all the costs.

Mr. *Heald* and Mr. *Rose* for the petition.

Mr. *Wingfield* and Mr. *Horne* for the respondents.

(a) See *Ex parte Durent*, ante. 201.

EAST TERM,
1817.

Ex parte GREENWAY.—In the Matter of
BURGESS.

If a bill of exchange do not carry interest upon the face of it, a debt made up of the principal sum secured by the bill, and the interest up to the act of bankruptcy, though the bill be noted and protested according to the 9th and 10th of William III. c. 17, is not a good petitioning creditor's debt. Costs are not given upon an appeal from the deliberate judgment of the commissioners, but the rule does not extend to *ex parte* cases where the opposite side has not the opportunity of being heard, and the commissioners have not exercised a deliberate judgment.

THIS was a petition to supersede the commission, on the ground of its being concerted. It also charged that the petitioning creditor's debt was not sufficient to support the commission.

It appeared that the petitioning creditor was the indorsee of the following bill of exchange, drawn by the bankrupt:

" Manchester, 2d January, 1816.

" Three months after date pay to the order of myself £.98 11s. value received.

Sambrook Burgess."

" To Messrs. T. P. and Co."

This bill was dishonoured, and the debt was made up of the principal sum and interest, and the expenses incurred in consequence of its being protested.

Sir S. Romilly and Mr. Montagu for the petition.

It is not expressed on the face of the bill of exchange that the debt should bear interest, and at law when interest it not part of the contract, it can only be recovered by way of damages. *Ex parte Cocks. (a)*
Ex parte Williams. (b)

(a) 1 Rose B. C. 317.

(b) 1 Rose B. C. 399.

But it has been long settled, that as the commissioners cannot award damages, a demand which it would be the province of a jury to give to a plaintiff in the shape of damages cannot be proved before the commissioners, and therefore cannot be a debt to support a commission. *Ex parte Marlar. (c)* 1817.
Ex parte GREENWAY.
—In the Matter of BURGESS.

Mr. Hart and Mr. Agar in support of the commission.

Upon every written agreement to pay money on a day certain, though it is not part of the agreement that interest shall be paid from that time, yet the law raises an implied contract, and gives interest from the period fixed for the payment of the principal money. Lord *Alvanley*, in *Parker v. Hutchinson, (d)* and the present Master of the Rolls, in *Lowndes v. Collens, (e)* have both determined that it is immaterial, whether the agreement is in the shape of a promissory note, or of any other written instrument. Lord *Alvanley* says he spoke to Lord *Kenyon* as to the practice at nisi prius, upon promissory notes, who informed him that the judge does not leave it to mere damages, but directs the jury to give interest. Now this being the practice in the courts of law as to promissory notes, it is to be inferred that a similar practice prevails as to bills of exchange; for what is there in the nature of the contract arising upon a bill of exchange, that should induce the court to leave the question of interest to a jury, when in the case of a promissory note it directs interest to be given to the plaintiff?

(c) 1 Atk. 150.

(d) 3 Ves. 133.

(e) 17 Ves. 37.

1817.

Ex parte
GREENWAY.
—In the
Matter of
BURGESS.

But admitting that where the payment of interest is not provided for by the contract, that it cannot be recovered otherwise than as damages, yet in this case there are special circumstances taking it out of that general rule, if such an one there be. The bill was protested, pursuant to the act 9th and 10th William 3d. c. 17. and due notice of the protest was given to *Burgess*; but it is enacted in the 2d section of the act, that the party is to repay, &c. which shews that the legislature intended where a bill is protested, the party should be liable to pay interest as a debt, and not as damages; and the remedies given by the 3d and 4th of Anne, c. 9. upon promissory notes, warrant that construction of the act of William 3d; for as the act of Anne does not put promissory notes upon the same footing with inland bills of exchange as to the protest, so it only provides that the plaintiff shall recover the principal sum, damages and costs of suit, without making the defendant liable to pay interest as in the case of protested inland bills of exchange. As the interest here amounts to £. 1 17s. 2d., which added to the principal sum of £. 98 11s., (without including the other costs and expences) exceeds the sum required by the statute, the commission must be considered valid.

1st September, 1817.

The LORD CHANCELLOR delivered the following judgment:

I do not think that, in this case, the concert is sufficiently made out, to overturn the commission upon that ground. The question, whether the petitioning creditor has a sufficient debt, depends upon not *fact* but *law*. The rule has been in bankruptcy not to consider interest when recoverable as damages, and

not reserved on the face of a bill or notè, as debt proveable. A distinction has been attempted in this case, viz. that the damages and expences and their amount paid by the petitioning creditor to another, may be considered as money paid and advanced for the use of the bankrupt, who was liable upon the bill: but that involves the question, whether if A is liable in damages to B, and C is liable in damages to A, on the same bill, that which is damages between C and A, becomes money advanced to the use of C, if A pays his damages to B, and then demands them over against C as money paid for his use? There seems to me to be great difficulty in this proposition; but having regard to modern cases at law about interest, I doubt whether I ought to refuse a case. If either party desires it, let them communicate to the secretary, whether they do desire it, within a fortnight.

1817.

Ex parte
GREENWAY.
—In the
Matter of
BURGESS.

An order was drawn up, that a case should be stated for the opinion of the court of Common Pleas, and the question to be, whether under the circumstances stated, *Daniel Cropper* had, at the time of suing out the commission, a good and sufficient debt, as petitioning creditor, to support it; and it was referred to one of the masters of the Court of Chancery to settle the case if the parties should differ about the same; and his Lordship reserved the consideration of costs and all further directions, until after the case should have been argued and the opinion of the said court of Common Pleas obtained. The parties not agreeing, the following case was settled by the master.

“In the matter of *Sambrook Burgess*, against whom a commission of bankrupt hath been awarded and

1817. issued, case for the opinion of the court or Common Pleas, in pursuance of an order, &c. A commission of bankrupt was awarded and issued against the said *Sambrook Burgess*, on the petition of *Daniel Cropper*, and the act of bankruptcy on which the said commission was founded, was committed on the 23d day of August 1816. The debt in respect of which the said *Daniel Cropper* procured the said commission to be issued, was sworn by him to be due on or in respect of a bill of exchange, in the following words; viz.

£.98 11s.

Manchester, Jan. 2d, 1816.

Three months after date pay to the order of myself ninety-eight pounds eleven shillings, value received, as advised.

Sambrook Burgess,

To Messrs. Butterworth and Evans,
Watling Street, London.

And the said bill was accepted by the said Messrs. Butterworth and Evans, as follows; Accepted—payable at Messrs. Glyn, Mills and Co. “Butterworth and Evans;” and was thus endorsed:—Pay Messrs. Tho. Peet and Co. or order, “Sambrook Burgess;”—per pro Tho. Peet and Co. “D. W. Osbaldiston, Daniel Cropper.” The said bill having been thus endorsed by the said *Sambrook Burgess* to Messrs. Thomas Peet and Company, and by them in manner aforesaid to the said *Daniel Cropper*, he the said *Daniel Cropper*, before the bill became due, for a valuable consideration, endorsed the same to John Cropper, who indorsed it, for a valuable consideration, to one Joshua Metcalf. The said bill not being paid, Joshua Metcalf caused it to be noted and protested for nonpayment, and after it had been protested it was returned by the said Joshua Metcalf to the said Daniel Cropper, and the said Joshua Metcalf de-

manded of the said Daniel Cropper, and he actually paid or allowed to the said Joshua Metcalf, on the 8th day of April 1816, the sum of £.98 11s. the amount of the bill, and 13s. 8d. for the protest and expences, making together the sum of £.99 4s. 8d. The protest was made and written on the 5th day of April 1816, the day on which the said bill of exchange became due, and due notice of the nonpayment and also of the protest was given to the said *Sambrook Burgess*. The amount of the debt claimed by the said *Daniel Cropper*, to be due to him from the said *Sambrook Burgess* at the time of petitioning for and of the issuing of the said commission of bankrupt, consisted of the following particulars:—amount of the bill, £.98 11s.—four months and 16 days interest thereon, £.1 17s. 2d.—protest and expences, 13s. 8d.—£.101 1s. 10d. The question for the opinion of the court is, whether, under the circumstances stated, the said *Daniel Cropper* had, at the time of suing out the said commission of bankrupt against the said *Sambrook Burgess*, a good and sufficient debt, as petitioning creditor, to support the said commission.”

1817.
—
Es parte
GREENWAY,
—In the
Matter of
BURGESS.

The case came on to be argued in the court of Common Pleas on the 12th day of November 1818, before the Right Hon. Sir *Robert Dallas*, Knight, Lord Chief Justice, the Honorable Sir *James Allan Parke*, Knight, and the Honorable Sir *James Burrough*, Knight, Justices of the said court of Common Pleas, who certified as follows:—This case has been argued before us. We have considered it, and are of opinion, that under the circumstances above stated, the said *Daniel Cropper* had not, at the time of suing out the said commission against the said *Sambrook Burgess*, a good and sufficient debt, as petitioning creditor, to support the said commission.

1817. 23d August, 1819.

Ex parte
GREENWAY,
—In the
Matter of
BURGESS.

The petition now came on upon the further directions.

Mr. Heald and Mr. Montagu for the petition,

Mr. Agar for the petitioning creditor.

Mr. Duckworth for the bankrupt,

It was insisted, on behalf of the petitioning creditor, that the rule was imperative as to the costs, which are never given, excepting in cases of fraud, upon an appeal from the judgment of the commissioners.

THE LORD CHANCELLOR.

I well remember this case. There were two points: first, there was a charge of concert, and secondly it was alledged that the petitioning creditor's debt was insufficient. I was of opinion that a case of concert was not made out. As to the second point, so far as I could trust my own judgment, it appeared to me there was not a good petitioning creditor's debt; for in all my experience, I never heard of a creditor being suffered to prove for interest, in a commission where the bill did not carry interest upon the face of it. Where it is part of the contract that the bill shall carry interest, it may be proved. Lord *Hardwicke* says, commissioners cannot award damages, and therefore where interest formed no part of the contract, he would not permit the proof. (f) I certainly never, till lately, understood the grounds of

(f) *Ex parte Marlar*, 1 Atk. 150

CASES IN BANKRUPTCY.

429

Lord Hardwicke's decision, than whom there never was a better common lawyer: for my difficulty always was, how that could be damages, which a judge could give; but during the late sessions there was a very learned argument before the House of Lords, (g) in which it was clearly made out, by the authority of cases of great antiquity, that a judge, where it is a matter of mere computation, may give interest, but yet such interest is of the nature of damages.

1817.
—
Ex parte
GREENWAY
—In the
Matter of
BURGESS

The commission must be superseded; but as it is an appeal from the judgment of the commissioners, I cannot give costs.

The counsel for the petition having suggested that the rule was not so general as not to admit of exceptions, his Lordship desired the case might be again mentioned,

24th August.

2. (g) I am indebted to the kindness of my friend, Mr. Bligh, for the subjoined note of the case alluded to by the Lord Chancellor.

Eyre v. The Bank of England.—House of Lords, 7th July, 1819.

This was a writ of error against a judgment of the court of King's Bench, in an action upon a bill of exchange. The declaration consisted of seven counts, comprising two for common bills of exchange drawn in the usual way, one for interest, and four common money counts. The plaintiff having obtained interlocutory judgment upon demurrer to the replication, entered up his judgment remitting damages upon the money counts, and taking an assessment, by reference to the master, upon the three remaining counts. The principal error assigned was, that as the count for interest was

not founded upon any written instrument or express contract, but founded in damages only, it could not be ascertained otherwise than by a jury; and that the court had no authority to assess them without the consent of the defendant to the action.

Upon argument of the case and authorities cited, at the bar of the House of Lords, the judgment of the court below was affirmed; thereby deciding that a court of common law may assess damages upon a count for interest in a declaration, by a reference to the master, without the intervention of a jury.

1817. Mr. Heald and Mr. Montagu.

Es parte
GREENWAY. It must be admitted the practice is, that costs are
—In the not given upon an appeal from the deliberate judg-
Matter of ment of the commissioners; but the rule has never
BURGESS. been extended to *ex parte* cases, where no one has
the opportunity of questioning the statement made to
the commissioners, or of adducing arguments to shew
that their judgment ought to be otherwise. If this
were not so, there never could be any costs given
upon a petition to supersede a commission.

THE LORD CHANCELLOR.

The argument which has been used, convinces me
that the principle I yesterday laid down went a great
deal too far. I was wrong in what I stated to be the
general practice; for as it has been well observed, if
that were so, there could be no costs given in many
cases of supersedeas. Before I decide the question of
costs, I should wish to look into the proceedings.
This is not a common case; and I cannot help
thinking that the commissioners must have given
some judgment upon the validity of the debt.

Ex parte RICHARDSON—In the Matter of LINC. INM.
HODSON. 19 August,
1819.

THE petitioners in this case (*a*) having appealed from the Vice Chancellor's judgment, when the petition came on, each side insisted upon the same arguments that had been used at the original hearing. His Lordship thought it might be very material to know what the state of the testator's funds were at the time of his death; and deferred giving his judgment till after he had been furnished with such a statement.

25th of August.

THE LORD CHANCELLOR declared his opinion to be, that the Vice Chancellor's judgment was right. He did not think, if there had been a sufficiency for all the other purposes of the will, the testatrix would have been authorized to employ the surplus funds in the way she did; and therefore if the funds were insufficient, she could not, of course, be justified in bringing the property into the trade.

Order of the Vice Chancellor confirmed.

Mr. Horne and Mr. Bickersteth for the petition.

Mr. Heald and Mr. Spence for the respondents.

(*a*) See the case ante 202.

LINC. INN. *Ex parte* EMERY.—In the Matter of CHARD.
14 August,
1810.

Where the amount of a solicitor's bill up to the choice of assignees is *prima facie* exorbitant, it is of course to refer it to the master to be taxed.

If it appear that persons have conspired together in the issuing of a fraudulent commission, the Lord Chancellor will direct the necessary documents to be laid before the attorney general, with a view to the institution of criminal proceedings against the parties.

THIS petition prayed, that the commission might be superseded on the ground of concert, and that an order which had been got in the bankruptcy might be discharged, or otherwise that it might be referred to the master to tax the solicitor's bill of costs up to the choice of assignees. There was no specific charge of any improper item in the solicitor's bill, but it amounted to £105, and it had not been taxed by the commissioners.

The LORD CHANCELLOR, after the case had been argued, said, the latter part of the prayer of this petition to refer a bill amounting to so large a sum to the master to be taxed, is quite of course. With respect to superseding the commission, it is fit the public should know, where, with a view to impose upon the great seal, commissions are taken out upon the fabrication of negotiable paper, having the semblance of a good consideration, when in fact nothing has been paid for them, that all persons engaged in such transactions are guilty of a heinous offence.

In this case, I order all the proceedings to be brought into my secretary's office, and I give all parties leave to make any application to me by affidavit before Saturday next; and if these shall not then appear a satisfactory explanation of the transactions that have taken place under this commission, I shall, as my predecessors have done before me, direct the Attorney General to take those steps for

the prosecution of the parties, that the case may require. (a) 1819.

The Attorney General and Mr. *Rose* were for the petition.

Ex parte
EMERY.
—In the
Matter of
CHARD.

Mr. *Horne* and Mr. *Shadwell* for the respondents.

Ex parte IRVING.—In the Matter of M^c KENZIE. LINC. INN,
Aug. 27th,
1819.

THIS was a petition to be permitted to prove a debt which would turn the certificate, and in the mean time to have the certificate stayed. The debt amounted to £. 58,000 and upwards, and the petitioner not having been guilty of lachess, the order was made to stay the certificate. The petitioner having the bankrupt under an arrest upon mesne process, Mr. *Pepys* insisted the order ought also to discharge him. The LORD CHANCELLOR thought a short petition ought to be presented for that purpose; but said he would look into the point.

Where a creditor who petitions to prove his debt holds the bankrupt in arrest under mesne process, he is entitled to his discharge instantan upon the order for the proof.

28th August.

The LORD CHANCELLOR declared his opinion to be, that the bankrupt was entitled to his discharge instantan.

Mr. *Montagu* appeared for the petitioner.

(a) Where the conduct of a solicitor to the commission is suspicious, the court has been in the habit of retaining the petition, to give the solicitor an opportunity of making an affidavit to give an account of his conduct.
Ex parte *Kershaw*, 6 Ves. 2.
Ex parte *Edwards*, 6 Ves. 3.

LINC. INN,
14, 15 July.
1819.

SIMPSON'S CASE.

If the time for the bankrupt's last examination be enlarged, the stat. 5. Geo. 2. c. 30. protects him from arrest during the whole of the last day of examination.

THE commission issued on the 22d of May, and the commissioners appointed the 5th and 12th of June and 6th of July for the sittings. On the 6th of July the bankrupt attended to finish his examination; but in consequence of the absence of the assignees, he did not finish it, and the commissioners adjourned to the 13th of July, when the bankrupt attended and finished his examination. After the bankrupt had left the commissioners, and on the same 13th of July, he was arrested. The examination ended at eleven, and he was arrested at one o'clock.

The attorney of the plaintiff at law and the officer were served with notice of this application, (a) which was by motion, that the bankrupt might be discharged out of custody.

Mr. Beames in support of the motion, contended that the enlarged time stood upon the same footing as the 42 days, during which the bankrupt was protected by the stat. 4 Geo. 2. c. 30. s. 5. and as it had been determined in *ex parte Donlevy*, (b) that the bankrupt was protected during the whole of the 42d day, so when the time had been, as in this instance, enlarged, he was protected during the whole of the enlarged day.

Mr. Rose contra, cited the distinction taken by the

(a) Price's case. 3 Ves. and B. 23.

(b) 7 Ves. 317.

Lord Chancellor, in *ex parte Davies*, (c) where the time is extended beyond the 42 days.

1819.

SIMPSON'S
CASE.

The LORD CHANCELLOR.

Notwithstanding I did not decide the point in the case that has been cited, as I am not in the habit of giving opinions upon questions that are not before me, I think the same construction must be put upon the statute when the time is extended.

Bankrupt discharged.

In the Matter of CHILD.

LINC. INN,
12 Aug. 1819.

MR. Barber moved the court for an order to direct the secretary to seal the commission in this matter, as a country commission. It is not sufficient upon an application to seal a commission, as a country commission, for the affidavit to state that the major part in value of the creditors did not live within fifty miles of London, and that the major part of the country creditors resided at Nottingham.

The affidavit, in support of the motion, stated, that the major part in value of the creditors did not live within fifty miles of London, and that the major part of the country creditors resided at Nottingham.

The LORD CHANCELLOR.

That affidavit will not do. It is not sufficiently particular, for there may be only half-a-crown difference between the value of the London and country debts.

Motion refused. (a)

(c) *Ante*, 80.

(a) See *ex parte Bowdler*, 1 Rose, B. C. 48.

LINC. INN, *Ex parte* BATTIER.—In the Matter of BATTIER.
16 Aug. 1819.

If fraud be established, the court will supersede the commission before the finding of the commissioners. So where a commission was sued out upon the petition of the trustee of an equitable creditor, who had signed a composition deed with the bankrupt, the court superseded the commission.

THIS petition was to supersede the commission.

Mr. Heald and Mr. Rose, as a preliminary objection to the petition, stated, that the commissioners had not found a bankruptcy, and upon the authority of the reported cases, (*a*) they contended that the court would not make any order before the commissioners had determined upon the validity of the commission.

The LORD CHANCELLOR said, he apprehended that was not a sufficient reason to prevent the superseding of the commission, if the case required it. He agreed to the rule as it had been stated at the bar, but he was of opinion, where there was a charge of fraud, the rule did not apply, as it was the duty of the court always to put an end to fraud without loss of time.

The petition was therefore permitted to proceed, when it appeared that an equitable creditor, who had signed a trust deed of composition made by the bankrupt with his creditors, had prevailed upon his trustee to sue out the commission.

The LORD CHANCELLOR.

I take it to be quite clear, that if a creditor sign a trust deed, he cannot take advantage of its being an

(*a*) *Ex parte Stokes*, 7 Ves. 405. *Ex parte Lancaster*, 1 Rose, B.C. 220.

act of bankruptcy; and I am of opinion, that if he be an equitable creditor, he cannot call upon his trustee to do that which he could not himself do, if he had the legal right to the debt.

1819.

Ex parte
BATTIER.
—In the
Matter of
BATTIER.

I should be sorry if I were understood as breaking in upon those cases where I have said that I would not supersede a commission before the adjudication of the commissioners. But where I see a person having an equitable debt, and having signed a composition deed, attempting to sue out a commission, by making use of the name of his trustee, I think it is a case that calls upon me to supersede the commission.

Commission superseded with costs.

Mr. *Wingfield* and Mr. *Pemberton* appeared for the respondents.

Ex parte HENSOR.—In the Matter of BOSS.

LINC. INN,
17 Aug. 1819.

A SOLICITOR had presented a petition to have his bill paid, which was set down in the Vice Chancellor's paper of petitions; but no one appearing for the petition when it was called, it was dismissed with costs. The respondents afterwards proceeded to tax the costs.

When a petition of re-hearing is presented, an order to have the original petition re-heard may be had upon an *ex parte* application.

The petitioner then presented a petition of rehearing, and obtained an order upon an *ex parte* application, that the original petition should be reheard.

1819. The object of this petition was to discharge the order.

Ex parte
HENSOR.

—In the
Matter of
Boss.

The LORD CHANCELLOR was of opinion, that upon a mere petition for a rehearing, it was not necessary to give notice to the opposite side, and he dismissed the petition with costs; but he ordered the petitioner to have the costs directed by the Vice Chancellor, and those attending the taxation in the master's office.

Mr. Teed for the petitioner.

Mr. Montagu for the respondents.

LINC. INN, *Ex parte* FECTOR.—In the Matter of PITMAN.
18 Aug. 1819.

The Lord Chancellor's jurisdiction as to acts done in the bankruptcy, is not determined by the superseding of the commission. So after the commission is superseded, a petition will lie on behalf of a purchaser of the estates put up to sale by the assignees, for the repayment of the deposit.

THE bankrupt's estates had been sold by auction, at which the petitioner became a purchaser to the amount of £.31,000, and he paid a deposit of £.6,000. The commission had been superseded on the 3d of August, and this petition, which was to vacate the contract, and to have the deposit repaid, had been presented on the 10th of August. The case being so circumstanced, it was objected that the court had not jurisdiction upon petition, and that a bill in equity ought to be filed for the purpose of vacating the sale.

The LORD CHANCELLOR.

I take the principle to be, that whatever has been done in the bankruptcy may be undone by petition,

notwithstanding the commission is superseded. I certainly cannot enter into any inquiry as to the costs and damages that have arisen in consequence of the nonperformance of the contract. That must be the subject of an action. But I have not the least doubt of my jurisdiction to order the assignees to repay the money they have received as a deposit. (a)

1819.

Ex parte
FECTOR.
—In the
Matter of
PITMAN.

Mr. Heald appeared for the petitioners.

Mr. Wetherell for the assignees.

Mr. Pemberton for the auctioneer.

Ex parte HOLT.—In the Matter of WOOD.

LINC. INN,
26 Aug. 1819.

MR. HORNE took a preliminary objection to this petition of appeal from the Vice Chancellor's order, that it had not been signed by a barrister.

A petition of
appeal from the
Vice Chancellor's
order must
have the signature
of a barrister.

Mr. Montagu insisted that it had never been held to be necessary for petitions of appeal to be signed by

(a) So in lunacy, where the direct authority of the Lord Chancellor under the King's sign manual determines with the life of the lunatic, yet the authority may be said to survive with respect to such acts as were incomplete at the death of the lunatic. Thus a master may proceed with a reference, *ex parte Armstrong*, 3 Bro. C. C. 237, and exceptions may

be taken to his report, in re *Roberts*, 3 Atk. 308, where a mortgage was paid off in the lifetime of the lunatic, an order after his death was made in the lunacy for the term, to attend the inheritance, *ex parte Grimstone*, Amb. 706. An attorney may petition to have his bill of costs paid, *ex parte M^r Dougal*, 12 Ves. 384.

1819. a barrister; but if his Lordship was of a contrary opinion, he hoped, as the practice was now for the first time settled, that the petition might be then heard, he undertaking to sign it.

Ex parte
HOLT.
—In the
Matter of
WOOD.

The LORD CHANCELLOR said, let Mr. *Montagu* sign it, and I will hear it now.

And it was accordingly opened and heard, Mr. *Montagu* undertaking to sign it.

LINC. INN, *Ex parte* REED.—In the Matter of SOWERBY.
24 Aug. 1819.

Where a bankrupt has been long in possession of his certificate, the court will not recall it.

THE LORD CHANCELLOR.

This is a petition that I should recall a certificate which the bankrupt has been in possession of for six years. The petitioner has been for many years acting as an assignee under the commission, and in 1812 he presented a petition to stay the certificate. When that petition came on to be heard, an inquiry was directed, and upon that inquiry the petitioner failed in making out a sufficient case to prevent the bankrupt from having his certificate. He now presents another petition, stating the discovery of facts that ought to influence the court to recall the certificate. I will assume, for the sake of my argument, that there is a very strong suspicion of the certificate having been obtained unfairly; but can I, at the request of this assignee, who on his former petition failed to make out a case, now withdraw the certificate of a person

who has for years been suffered to go into the commercial world and involve himself and others in all the consequences of an extensive trade? I hardly ever recollect a case where the Lord Chancellor has recalled a certificate. The instances are very few, and it never was done in a case like the present, when the bankrupt has been in possession of his certificate for so great a length of time. The petition must be dismissed with costs.

1819.

Ex parte
REED.

—In the
Matter of
SOWERBY.

The Attorney General and Mr. Rose for the petition.

Mr. Agar for the bankrupt.

Ex parte STAFF.—In the Matter of SAUNDERS. LINC. INN,
18 Aug. 1819.

THE petitioner having presented a petition of appeal from the Vice Chancellor's order, (a) when the matter came on upon the appeal, the substance of all the affidavits was fully stated to the court. (b) The solicitor to the commission deposed, that upon the choice of assignees of the estate and effects of the bankrupt, as in the said petition mentioned, the deponent was appointed their solicitor, and having shortly afterwards, from the examination of the said bankrupt and T. E. who was the solicitor who issued bankrupt the agent of the petitioning creditor, such a commission would be had at law, on the ground of an implied consent on the part of the petitioning creditor. The practice of the court is, where the case requires it, to direct the bankrupt to be examined upon an issue to try the validity of the commission,

A commission may have all the legal requisites for its validity, yet if it be sued out at the instance of the bankrupt, the court will, on that ground alone, supersede it.

Semble where the circumstances are such as to make the

(a) See the case ante, 249.

(b) See the affidavit of the bankrupt's solicitor, ante 250.

1819. the said commission, discovered that there was great reason to believe the said commission was not a legal commission, as it had been collusively issued, the deponent sought a meeting with T. S. the petitioning creditor, in order to ascertain from him the circumstances under which such commission had been issued. That on or about the 14th day of *March*, 1818, T. S. being then in London, the deponent obtained an interview with him, in company with Mr. *Henry Bloxam*, one of the assignees, when T. S. in the course of conversation, in answer to the inquiries of the deponent, informed the deponent and the said *Henry Bloxam*, that being in London on his own business, in *November* last, he was applied to by the bankrupt, who told him that Mr. *Staff* had obtained an award against him, (the bankrupt) and that he had no means of getting released from his difficulties, but by becoming a bankrupt, adding, that there was no creditor resident in town whose debt was sufficiently large to strike the docket, and expressing a wish that he T. S. should do it; but T. S. did not then declare his intention to the bankrupt, wishing first to consult some friend on the subject, and that he did consult a friend upon the risk he should incur; and being informed that if there were sufficient effects the expences would be paid out of the estate, and if not, that the creditors who should prove their debts must contribute to discharge them, he saw the bankrupt again, and informed him that he was willing to issue the commission; whereupon the said bankrupt recommended T. E. as the attorney to be employed, and he undertook to see T. E. previously, and requested T. S. to meet them at the King's Head Tavern, in the Old Change, the following day, and that T. S. met them there accordingly. The bankrupt was there first, and when T. E. came, he ex-

Ex parte
STAFF.
—In the
Matter of
SAUNDERS.

plained the nature of striking the docket, and took instructions accordingly, the said bankrupt being present the whole time, and he and T. E. were left there together, and that T. S. did not advance T. E. any money on account of the said business, or T. S. at such interview with the deponent, used words to the effect above stated.

1819.

Ex parte
STAFF.

—In the
Matter of
SAUNDERS.

T. S. the petitioning creditor, by his affidavit, stated, that he being in London about the beginning of *November*, 1817, for the purpose of attending to his business there as a common carrier, and that whilst the deponent was at his quarters at the George Inn, Aldermanbury, on or about the 4th or 5th of the said month of *November*, the bankrupt came to him, and informed him that he was in considerable difficulties respecting his business, and that he expected a Mr. *Staff* would levy an execution on his goods for a large debt, and requested the deponent to sue out a commission of bankrupt against him, as he said a bankruptcy would be the only thing to prevent Mr. *Staff*'s execution from taking effect, and of enabling the said bankrupt to get clear of his difficulties. That the deponent objected so to do; but the said bankrupt afterwards called on the deponent, either the same evening or in the morning of the next day, and informed the deponent that if he would strike the docket, Mr. T. E. who the said bankrupt said was his attorney, and whom he had seen on the business, would manage every thing, and that the deponent would have no trouble with it; and the said bankrupt further stated to the deponent, that he had appointed for himself and the deponent to meet T. E. at the King's Head, Old Change, on the business.

That the deponent soon afterwards went thither,

181D.

Ex parte
STAFF.—In the
Matter of
SAUNDERS.

where he found the bankrupt, and after a very short space of time had elapsed, T. E. also came in; that T. E. then informed the deponent the meaning of striking a docket, and what was necessary to be done in consequence thereof, of the nature of which, deponent was before totally ignorant; and after some other observations had passed, the particulars whereof the deponent does not now recollect, he, the deponent, was persuaded by the said bankrupt and T. E. to sign some papers for the purpose of suing out a commission of bankrupt against the said bankrupt. That until the said bankrupt called on him as before stated, he, the deponent, had not the least idea of any commission of bankrupt being to be issued against the said bankrupt, and that T. E. had never been before employed by the deponent in any business whatever, neither had he any particular acquaintance with him before the above mentioned day of their meeting. That being then unacquainted with the nature of the proceedings necessary for suing out a commission of bankruptcy, he had no conception that any degree of fraud was intended in suing out the commission against the said bankrupt, nor did he know of any previous concertment of the business between the said bankrupt and T. E. or any other person or persons; but on the contrary, he, the deponent was, from the observations then made by the said bankrupt and T. E. induced to believe that the issuing of a commission of bankrupt against the said bankrupt would operate generally for the benefit of the creditors of him the said bankrupt, and that by suing out such commission, he, the deponent, would not incur any risk of expence or trouble in the business.

The bankrupt, by his affidavit, stated, that he, in the year 1806, entered into partnership with *William*

Staff, one of the petitioners in this matter, together with *William Turtle*, now of the George Inn, Aldermanbury, as Warehousemen, in Size Lane, in the City of London, and which partnership was, as to the said *William Turtle*, dissolved in the year 1813. That he continued in partnership with the said *William Staff* until the month of *February* 1815, when the same was dissolved, and by a deed thereupon prepared and signed by the deponent and the said *William Staff*, it was agreed that the stock in trade belonging to the partnership should be equally divided between the deponent and the said *William Staff*, which was accordingly done by their two warehousemen. That the stock of goods which was, pursuant to such agreement, delivered to him, he, the deponent, considered himself justly entitled to, and had not the least idea but the same was a fair decision; that he was also entitled to a proportion of outstanding debts, amounting to about £. 8000, which were due to the said two partnerships. That disputes arising between the deponent and the said *William Staff*, relative to the settlement of their accounts, they appointed a Mr. *Husey*, an accountant, who; without examining the accounts of the partnership of *Staff*, *Saunders* and *Turtle*, in which errors had since been discovered, made out an account, and therein stated that the sum of £. 2,400 and upwards was due from the deponent to the said *William Staff*. Saith, that in the month of *January* 1816, he having occasion to go into the country with patterns, and to take orders in his business of a warehouseman, the said *William Staff*, on the second day of *February* following, maliciously struck a docket, and issued a commission against the deponent, and gave notice of such docket to the deponent's bankers, Messrs. *Everett* and company, who, in consequence, refused to pay the deponent's bills,

1810.

Ex parte
STAFF.—In the
Matter of
SAUNDERS.

1819.

Ex parte
STAFF.—In the
Matter of
SAUNDERS.

which were therefore returned dishonored, although they had cash in their hands sufficient to meet the same. Saith, that his credit thereby became materially injured, and to which he solely attributes his present failure. Saith, that the said *William Staff*, not being able to prove an act of bankruptcy committed by this deponent, immediately arrested the deponent for the sum of £.1,900, and which action, together with one brought by this deponent against the said *William Staff*, for the injury the deponent had sustained by his striking such docket and issuing such commission, were, under the direction of the court, referred to *Thomas Spankie*, Esq. who awarded the deponent the sum of £.500 for his damages, and which sum being deducted from the sum of £.1,904 19s. 3d. awarded by the said *Thomas Spankie* to the said *William Staff*, as a debt due from the deponent, left the sum of £.1,464 19s. 3d. as due to him, with costs, although this deponent saith that the said *Thomas Spankie* did not give the deponent credit for his share of the outstanding debts. Denies that he concerted an act of bankruptcy either with T. S. or with T. E. Denies, that he did on or about the 3d or 4th day of *November*, 1817, request T. S. to take out a commission of bankrupt against him, as the only means of extricating him from his difficulties. Denies that he did either the same evening or in the morning of the next day, inform T. S. that if he would strike the docket, T. E. who was the deponent's attorney, and whom he had seen on the business, would manage every thing. Denies that he informed T. S. that he had appointed himself and T. E. to meet at the King's Head, Old Change, for the purpose of striking the said docket. Denies that he ever applied to T. E. to sue out a commission of bankrupt against him, nor had he, the deponent, seen T. E. from the time

T. S. came to London, on the 3d or 4th day of November, 1817, until he saw him at the King's Head Coffee-house, Old Change, upon other business. Saith, that from the cruel conduct he had experienced from Mr. Staff, he was fearful of the steps he might take against the deponent, and being in company with J. S. the brother of the said T. S. who is not a creditor of the deponent, he mentioned his fears of Mr. Staff, and expressed a wish that some person would make him a bankrupt to extricate him from his difficulties, and which the deponent says most solemnly he said not with a view to defraud his creditors, but to prevent the said Mr. Staff seizing upon his property, and thereby prevent an equal division amongst them. Saith that T. E. being in town on the 3d or 4th of November, 1817, J. S. mentioned, as the deponent believed, the conversation he had with the deponent, for the deponent saith that on his seeing T. S. on the same day, he asked the deponent where he could see T. E. and the deponent then informed him that he had appointed T. E. to meet him at the King's Head Coffee-house, Old Change, on the following morning, at 11 o'clock, upon business, and if he looked in about 12 o'clock he would be sure to see him. Saith, that T. E. attended, about the hour of 11, his appointment with the deponent at the said coffee-house, and the deponent was sitting alone in the public coffee-room, and about 12 o'clock T. S. accompanied by J. S. his brother, also came into the coffee-room, and thereupon the deponent left T. S. and T. E. in conversation together, but what transpired the deponent would not speak to. Denies that he or T. E. persuaded T. S. to sign a paper for the purpose of suing out a commission of bankrupt against him, the deponent. Denies that he ever applied to T. E. to make him a bankrupt. on the contrary the

1819.

Ex parte
STAFF.

—In the
Matter of
SAUNDERS.

1819.
 —
Ex parte
STAFF.
 —In the
 Matter of
 SAUNDERS.

deponent saith that T. E. advised him not to become a bankrupt. Denied that T. E. was privy to or knew of any act of bankruptcy committed or about to be committed by the deponent, until after the same was committed by him the deponent, nor was T. E. privy to or knew of the said T. S.'s intention to meet the deponent at the King's Head Coffee-house to make the deponent a bankrupt, until T. E. received instructions from T. S. to strike the docket at the said coffee-house. Saith, that not one bill has been proved under the deponent's estate which was given as an accommodation for any person whatever, in the nature of an accommodation bill. Saith, that at the last examination of him, the deponent, under his commission, he passed his accounts not only to the satisfaction of the commissioners but also to Mr. *Mayhew* the solicitor, and to his creditors generally, who were present at such meeting. That the debt of *William Davies*, alluded to by the petitioners, was, deponent believed, a safe and recoverable debt, and also that he had at the time of his bankruptcy other property which he had duly accounted for and given up without fraud or collusion to his creditors, and also debts due not only to the partnership with *Staff* and *Turtle*, but also to the partnership between the deponent and the said *William Staff*, to the amount of about £.2,000, the greater part of which the deponent is firmly of opinion might be recovered, and might have been so if proper steps had been taken by the said *William Staff*, who was authorized by their deed of dissolution of partnership to receive and recover the same.

The Attorney Gen. and Mr. *Collinson* for the petition.

We apprehend, if we can shew to your Lordship that this commission issued at the instance of the

bankrupt, it must be superseded; for as the law now stands, no man is permitted to make himself a bankrupt; and an attempt to do by indirect means that which cannot be done directly, is an abuse of the process of the great seal. The petitioning creditor, in the affidavit he has made, admits that the commission was sued out at the request of the bankrupt, and the bankrupt himself, so far from denying that fact, says that he did not suggest the commission with any fraudulent intent, but with a view to the equal distribution of his property, and to prevent *Staff*'s execution.

1810.

Ex parte

STAFF.

—In the
Matter of
SAUNDERS.

(The affidavits of the bankrupt and of the petitioning creditor and of T. E. and his examination were read.) The commission was sued out by the bankrupt's own attorney, at the expense of the bankrupt, for T. E. says, that the bill for £.34 was given him by the bankrupt, and that he considered it as an advance made by the petitioning creditor, and by a comparison of dates, it appears that the bill was given between the striking of the docket and the issuing of the commission.

Mr. *Wetherell* for the petitioning creditor.

The general definition of a concerted commission is one in which the bankrupt and the petitioning creditor have collusively concerted the act of bankruptcy, and the cases have gone to this length, that although the act of bankruptcy be a concerted one, yet if the petitioning creditor be not privy to the fraud, the commission shall stand. This petitioning creditor had not any thing to do with the act of bankruptcy, nor is it even pretended that the act was fraudulent. The object of these parties in suing out the commission, was meritorious. It was to prevent one creditor from

1819. sweeping away the whole of the estate, and had in view the equal distribution of the property. Any creditor who has a sufficient debt may, if he think fit, sue out a commission to defeat an execution. This commission is good at law, and no case has yet been produced where a commission, having all the legal requisites to support it, has been superseded merely because it was sued out with the approbation of a trader desirous to have his estate fairly divided among all his creditors.

Ex parte
STAFF.
—In the
Matter of
SAUNTERS.

Mr. *Wingfield* appeared for the bankrupt's solicitor.

The LORD CHANCELLOR.

The first thing to be determined here is, whether this commission was taken out at the instance of the bankrupt, and if it were, then whether the judges who for twenty years sat before me in this place, have been in the wrong, all of whom have uniformly held, that a creditor may take out a commission to defeat a judgment; yet if that were done at the instance of the bankrupt, the commission cannot stand. It appears to me to be very doubtful whether this commission is good at law; for in that case from Worcestershire, where the attorney suing out the commission was the attorney of both the petitioning creditor and the bankrupt, the judge stated the law very correctly, when he said that if the solicitor be employed by both sides, and he advise the bankrupt to do that which will enable the petitioning creditor to take out a commission, though the creditor be not privy to such advice, yet as the solicitor is the agent for both sides, the commission is, on that account, a concerted one. Now what is the case here? It does not appear that the petitioning creditor concerted the act of bankruptcy: but then the bankrupt goes to him, and

says, only open the commission, and I will take care to manage the whole matter for you. The bankrupt also consults with T. E. whom the petitioning creditor had appointed his solicitor, and who says the bill for £.34 was given by the bankrupt for the petitioning creditor, so that the bankrupt is clearly the agent of the petitioning creditor. Now would not a judge be justified, by the authority of the Worcestershire case, in stating to a jury that the bankrupt being such an agent, if he committed an act of bankruptcy, in order to have a commission sued out, the petitioning creditor was, legally speaking, privy to it, and therefore that the commission was bad? So that it appears to me, even at law, this commission is invalid. But supposing it to be good at law, yet it has always been here said, that a commission taken out by a bankrupt is an abuse of the great seal, and therefore must be superseded. It may be very right to change the law upon this subject, but as the law now is, such a commission cannot stand. It has been this last session of parliament much canvassed, whether the legislature should not give every trader a power to make himself a bankrupt. It may be right so to do, but the discussion of itself shews at least the general understanding, that a trader has not now such a power. I will read and give my undivided attention to this petition, and to the affidavits, and I will, in the course of a few days, give my final judgment upon the case, which is one of the greatest importance to the public.

1819.

Ex parte
STAFF.
—In the
Matter of
SAUNDERS.

19th August.

The LORD CHANCELLOR.

I have read the petition and all the affidavits, and I still retain the opinion I threw out the other day. If the facts disclosed by those affidavits were before a

1819.

Ex parte
STAFF.—In the
Matter of
SAUNDERS.

jury; I am of opinion, unless they were very wrongly directed, they must find that the commission was invalid at law. Perhaps there might be a difficulty in bringing the facts before a jury, but I think that might be done by directing that the bankrupt should himself be examined, and it has always been the practice of the court to insert such a provision in the order for the trial of an issue when the case was of such a nature as to require it. With reference to the commission being the bankrupt's commission, I am of opinion, according to the well established rule of this court, that it cannot stand. The commission must be superseded at the costs of the solicitor, and the petitioning creditor.

LINC. INN, *Ex parte* HEYGATE.—In the Matter of HUMBLE.
18 August,
1819.

It is the practice of the court to take the assistance of a jury, when there is so much of doubt that such assistance is felt to be necessary to the right determination of the case. But it is not the practice for the court to put the parties to the expense of trial by jury, without first hearing all the evidence read and the case fully argued, unless the counsel on both sides agree, in stating that such must necessarily be the result, if the matter were gone into. Upon this principle the Lord Chancellor heard a petition upon an appeal from the Vice Chancellor's order, directing an action to be brought.

THIS petition stated, that the petitioners, on the 23rd day of *July* 1818, presented a petition to his Lordship, stating, that on or about the 29th day of *Sept.* 1815, a commission of bankruptcy was duly issued against the said *William Humble*, under which he was declared bankrupt, and that in or about the month of *November* 1814, the bankrupt was carrying on business as a merchant, and was engaged in the importation of timber, and that the bankrupt being in expectation of the arrival of some cargoes of

CASES IN BANKRUPTCY.

441

would, applied to the petitioner and to *William Beck*, since deceased, to lend him a sum to provide for the freight and duty of such cargoes, and that upon such application the petitioners and the said *William Beck* agreed to advance some money on the security of the said cargoes, and that for the security of the petitioners and the said *William Beck*, an agreement in the words and figures following was executed by the said bankrupt: "Memorandum of agreement made the 2nd of *December* 1814, between *William Beck* of Hackney in the county of Middlesex, *James Heygate* the younger, of Aldermanbury in the City of London, and *Robert Sutton* of Highgate, in the county of Middlesex, Esquires, of the one part, and *William Humble*, of Lime Street in the City of London, merchant, of the other part. The said *William Beck*, *James Heygate*, junior, and *Robert Sutton*, for the considerations hereinafter mentioned, do agree to advance to the said *William Humble* certain sums of money to assist him in paying freight and duties on the cargoes of certain vessels, when they shall arrive in the port of London, and which shall consist of timber wood and such other articles as can be legally received into the basons of the company of proprietors of the Grand Surry Canal, such advances not to exceed the sum of £.5 for every ton of such cargoes. In consideration whereof, the said *William Humble* doth hereby agree that every vessel upon which money shall be so advanced by the said *William Beck*, *James Heygate* and *Robert Sutton*, shall be by them sent into the basons of the said company, for the purpose of delivering such cargo, and that such vessels as cannot from any circumstance be taken into the said basons, may be unloaded in the river, and their cargoes sent into such basons. And the said *William Humble* doth hereby agree to pay

1819.

Es party
HEYGATE.
—In the
Matter of
HUMBLE.

1819.

Ex parte
HEYGATE.
—In the
Matter of
HUMBLE.

the said *William Beck, James Heygate and Robert Sutton* interest at £.5 per cent. on such sum and sums of money as may be so advanced to pay freight, from the respective times of such advance, and also like interest for such money as they shall advance for the payment of duties, provided the principal money advanced for such duties is not repaid within three months from the time it shall be advanced. And the said *William Humble* doth further agree to pay to the said *William Beck, James Heygate and Robert Sutton*, all such sum and sums of money as they shall so advance to him on account of freight, together with such interest as may become due as aforesaid, upon and out of the first sale that shall be made of any part or parts of the respective cargoes upon which the money shall have been so advanced, and before any part or parts thereof are taken out of the said basons, and together with such dues and rates as may have become payable to the company of proprietors of the Grand Surry Canal, by reason of the vessels and cargoes coming into and remaining in the basons of that company or otherwise, and that the said *William Beck, James Heygate and Robert Sutton* shall and may have a lien upon the said cargoes for the money so advanced or due and owing as aforesaid. And it is hereby declared, that either party shall be at liberty to put an end to this agreement on giving previous notice in writing to each other, and paying, performing and fulfilling the terms of the agreement as their respective parts up to the period at which the same shall be so ended. *William Humble.*" And that for the purpose of making such advances to the said bankrupt, the petitioners and the said *William Beck*, and several other members of the company of proprietors of the Grand Surry Canal, contributed different sums, but the

loan thereof was by the petitioners and the said William Beck to the said bankrupt, and the sums so lent to the bankrupt amounted to the sum of £.3288 15s. 0d. some part of which was afterwards repaid, but at the date and suing forth of the said commission, there remained a balance of principal and interest, amounting to the sum of £.1453 12s. 2d. due from the said bankrupt in respect of the said advances, and the monies paid under the said agreement; and that the petitioners attended on the 21st of July 1818, and offered to prove the said sum of £.1453 12s. 2d. but one of the commissioners was pleased to declare that, in his opinion, the debt could not be proved, because the said agreement was usurious; and that although the other two commissioners were pleased to declare that, in their opinion, the agreement was not usurious, the petitioners were unable to prove the debt. And praying that the petitioners might be at liberty to call a meeting of the commissioners for the proof of the said debt, and that the costs of that application and of the said meeting might be paid out of the estate. That the said petition came on to be heard before his Honor the Vice Chancellor on the 5th day of August 1818, when his Honor was pleased to order that the petitioners should be at liberty to bring an action at law against the said bankrupt for the balance, and that the assignees should defend the same, and that the said bankruptcy should not be pleaded in such action, and that the said balance should be admitted to be due. That the petitioners were advised that the question at issue on the said petition ought to be decided without incurring the delay and expence of a trial at law.

1819.

Ex parte
HEYGATE.
—In the
Matter of
HUMBLE.

1819.

The petition appealed to his Lordship from the said order.

Ex parte

HEYGATE.

—In the
Matter of
HUMBLE.

Mr. *Montagu* for the petition.

In bankruptcy, the mode in which the facts are brought before the court is by each party stating his case by affidavit, and it has always been the practice of your Lordship and of your predecessors first to hear all parties, and not to direct an inquiry till all the evidence has been heard, and the case, both as to the law and the facts, has been fully argued. In the other court a different practice has for the first time been introduced. When this petition was on before the Vice Chancellor, it was stated to him at the bar that the whole case turned upon a point of law, and his Honor, without hearing the point argued, sent it to law. There is no dispute as to the facts of the case; but when the petition was called, the respondents stated that the debt arose out of an usurious contract, and his Honor would not hear the case argued. It is from this decision we appeal. We say we are entitled to have the judgment of the court, and that we ought not to be put to the expence of a trial at law.

Mr. *Wetherell* and Mr. *S. Cullen* for the respondents, contended that whether a contract was usurious or not, was a proper case for a jury. That the question was one of fact, and not of law; and the Vice Chancellor had judged rightly in directing an action at law.

The LORD CHANCELLOR.

It has at all times been the course of proceedings for this court to take the assistance of a jury when

there is so much of doubt that the court feels such assistance to be necessary to the right determination of the case. But it has never been the practice to put the parties to the expence of a trial at law without first having all the evidence read, and the case fully argued, unless the counsel on both sides agree in stating that such must necessarily be the result if the matter were gone into.

1818.

Ex parte
HEYGATE.
— In the
Matter of
HUMBLE.

His Lordship having thus intimated his opinion of the practice, the question as to usury was argued, and afterwards his Lordship said he felt it to be his duty to look very accurately into the agreement, and that he would give his judgment on a future day.

CASES

11

BANKRUPTCY.

Ex parte WATSON.—In the matter of SHEATH. LINCOLN'S
INN.
Decem. 17,
1819.

IT appeared from the statements in the petition which were not disputed, that for some years previous to issuing the commissions of bankruptcy thereafter mentioned, *Abraham Sheath* and *Challis Sheath* carried on the business of bankers together at different places and with different persons, and under different styles or firms, that is to say—

Abraham Sheath the elder, } At Lincoln, under the
Challis Sheath, *John Steel*, } firm of *Sheath, Son*,
and *John Wray* } *Steel*, and *Wray*.

Abraham Sheath the elder, } At Boston, under the
and *Challis Sheath* } firm of *Sheath & Son*.

Abraham Sheath the elder, } At Wisbech, under the
Challis Sheath, and *William* } firm of *Sheath, Son*,
Watson the petitioner, and } *Watson*, and *Sheath*.
Abraham Sheath, jun. }

If a solvent partner pay all the joint debts, his proof against the separate estates of his partners will be limited to the amount of their respective shares of the joint debts so paid; and if their estates are insufficient to pay twenty shillings in the pound, the solvent partner will not be allowed to prove the deficiency of each estate against the estate of the other.

1819.

Ex parte
WATSON.
 In the Matter
 of
SHEATH.

The Petitioner, and *Abraham Sheath* the elder, and *Challis Sheath*, were interested in the partnership at Wisbech, in equal shares; but *Abraham Sheath* the younger was only a nominal partner, and had not any share or interest therein. On the 1st day of July 1814, a commission of bankruptcy was issued against *Abraham Sheath* the elder, and *Challis Sheath*, as bankers at Boston; and they were duly declared bankrupts, and the usual assignment was made to their assignees. At that time the firm at Boston was indebted to the firm at Wisbech in the sum of £15,709:1:0, of which the petitioner proved part to the amount of £15,179:13:4, the residue, to the amount of £529:7:8 not being at that time ascertained; upon which proof he received dividends to the amount of £2,763. A further dividend of two shillings in the pound was in course of payment. On the 4th day of July 1814 a commission of bankruptcy was issued against *Abraham Sheath* the elder, *Challis Sheath*, *John Steel*, and *John Wray*, as bankers at Lincoln, under which they were duly declared bankrupts, and the usual assignment was duly executed to their assignees. On the 21st day of March, 1815, the Lord Chancellor ordered that the commission issued against *Abraham Sheath* and *Challis Sheath* should be superseded, and that an auxiliary commission should forthwith issue, directed to certain commissioners at Boston, for the purpose of receiving the proof of such debts as were therein mentioned; and such proofs, when made, were to stand as proofs upon the proceedings under the commission against *Abraham Sheath*, *Challis Sheath*, *John Steel*, and *John Wray*; and that the proofs then already made under the commission against *Abraham* and *Challis Sheath* should be transferred to the joint commission as proofs against the estates of them or

either of them. After the supersedeas of the Boston commission the petitioner proved under the Lincoln commission, but against the joint estate of the Boston firm, the further sum of £529:7:8, but had not received any dividend thereon. The debts due from the firm at Wisbech, at the time of their failure, amounted to the sum of £85,389, and the effective assets of the firm, received, and to be received by the petitioner, amounted to the sum of £54,689, as appeared by the annexed account.

1819.
Ex parte
WATSON.
In the Matter
of
SHEATH.

Dr.			Cr.		
	£.	s. d.		£.	s. d.
By Balance Brought Over			Assets	£. 51906	
Debts paid	85343	17 5	Dividends paid by Boston Firm	2783	
Debts not paid, but which Mr. Watson is ready to pay	45	11 3	Deficiency, (errors excepted)	54689	0 0
				30700	8 8
	£. 85389	8 8		£. 85389	8 8

Leaving a deficiency of £30,700:8:8 liable to be diminished by future dividends. Of the several debts due from the Wisbech firm, the petitioner had paid part to the amount of £85,343:17:5, and was ready to pay £45:11:3, the residue thereof. A dividend of 12s. 4d. in the pound had been paid on the separate estate of *Challis Sheath*, (which did not exceed in the whole the sum of £500), amongst his separate creditors, and his separate estate had been thereby nearly exhausted, and there would be no further, or only a very trifling dividend. The deficiency, or sum of £30,700:8:8 had been actually made good and paid by the petitioner out of his own private property. The petitioner applied to the commissioners in the commission against the Lincoln firm to prove the sum of £15,350:4:4, being one moiety of the deficiency against the estate of *Abraham Sheath*, after a value

1819.
 —
Ex parte
 WATSON.
 In the Matter
 of
 SHEATH.

had been set on the future dividends to be received on the debts due from *Abraham Sheath* and *Challis Sheath* to the Wisbech firm; the petitioner at the same time offering to give up to the separate estate of *Abraham Sheath* one moiety of any sums which might be received from any debts due to the late Wisbech firm, and also which might be received from the estate of *Challis Sheath*, and also offering to take upon himself the payment of such of the debts, if any, as might yet be due from the late Wisbech firm, and to indemnify the separate estate of *Abraham Sheath* therefrom respectively; but the commissioners refused to admit of such proof. The petitioner then applied, under the same conditions, to prove £10,233:8:10, being the third of the said deficiency of £30,700:8:8, against the separate estate of *Abraham Sheath* the elder, but the commissioners also refused to admit that proof.

It was admitted in the argument that *Abraham Sheath* the younger was merely a nominal partner in the Wisbech firm.

The petitioner prayed that upon paying the residue of the debts due from the Wisbech firm, or upon his paying the amount thereof into court, or upon his indemnifying the estate of *Abraham Sheath* the elder from payment of the same, he might be permitted to prove one moiety of what remained of the sum of £30,700:8:8, or one third, as to his Lordship might seem proper against the separate estate of *Abraham Sheath* the elder, and to receive a dividend thereon, the petitioner giving up to such separate estate one moiety or one third part of all property that might be received on account of the Boston firm; or that, if to

his Lordship it might seem proper, a value might be set upon the future dividends to arise from the debt made against the Boston firm, and that such value might be deducted in the first instance from the debt due to the petitioner, and his proof limited to the difference between the whole debt and such value.

1819.

Ex parte
WATSON.
In the Matter
of
SHEATH.

Mrs. Ball, Mr. Girdlestone, and Mr. Montagu, for the petitioner.

The estate of the Wisbech firm being insufficient to satisfy the debts, the petitioner has, out of his own funds, made good the deficiency, and has paid all the demands against the firm, except the trifling sum of £45:11:8, which he is willing to pay into court. Under these circumstances, it is quite clear that the petitioner is entitled to a proof against the separate estate of Abraham Sheath the elder. The case *ex parte Young (a)*, *Wood v. Dodgson (b)*, *ex parte Taylor (c)*, and *ex parte Ogilvy (d)*, have set that question at rest. The principle of those decisions is, that a solvent partner paying the debts of the firm; if not a surety in the strict sense of the word, yet that he is in the nature of a surety, and is comprehended in the expression "persons liable," in the eighth section of Sir Samuel Romilly's act (e), and is entitled to a proof under those general words. The extent of the proof, and not the right to prove, is the difficulty we have to meet in this case. We contend, under Sir Samuel Romilly's act, that the petitioner is entitled

(a) 2 Rose B. C. 40. (b) 2 Rose B. C. 47. (c) 2 Rose B. C. 175.
(d) 8 Ves. and B. 133. (e) 49 Geo. III. cap. 121.

1819.

Ex parte
WATSON.
 In the Matter
 of
SKEATH.

to a proof to such an amount as he might have maintained in an action against *Abraham Skeath* the elder. In *Wright v. Hunter (f)*, the plaintiff was a partner in a ship, holding six twenty-fourth shares; the defendant and two other persons held the remaining eighteen shares. The ship having contracted debts, the plaintiff paid his contributory share of them to the defendant, who misapplied the money; and becoming bankrupt, the plaintiff was compelled by the ship's creditors to pay not only his own contributory share of the debts, but also the further sum of £168:13:4, by reason of a failure in the payment of the contributory shares of the other partners. The action was brought for both those sums, to which the defendant pleaded his bankruptcy and certificate. The court was of opinion, that the plaintiff's contributory share having been deposited with the defendant previous to his bankruptcy, the certificate was a bar to that part of the demand; but they determined that the plaintiff was entitled to recover the £168:13:4. This case, therefore, is an authority for the proposition, that if one partner pay more than his share of the partnership debts, he may in an action recover the amount so paid against any one of the other members of the firm. But as the payment in *Wright v. Hunter* of the £168:13:4, was made by the solvent partner in respect of his partnership liabilities, that action could not now, under the new law, be maintained; for as the £168:13:4 might be proved under the bankrupt partner's commission, the certificate would be a bar to the action.

Mr. *Heald* and Mr. *Rose* appeared for the assignees of *Abraham Skeath* the elder.

The VICE CHANCELLOR.

I consider it to be now settled by the cases of *ex parte Taylor* and *ex parte Ogilvie*, that a solvent partner winding up the partnership concerns after the bankruptcy of the insolvent partner, may prove under his commission for that share of the ultimate deficiency which the insolvent partner ought to have paid. The solvent partner is in truth a surety under Sir Samuel Romilly's act, paying the share of the insolvent partner after his bankruptcy. The petitioner therefore is clearly entitled to prove for one third of the ultimate deficiency against each of the estates of *Abraham Sheath* and *Challis Sheath*, it being admitted, that as between the partners, *Abraham Sheath* the younger was not interested in the profit or loss. For the purpose of proof it will be necessary to sell the right to the future dividends from the Boston Bank.

The question is, whether in respect of the small amount of the separate estate of *Challis Sheath*, an additional proof is now or hereafter to arise against the separate estate of *Abraham Sheath*.

I take the principle to be, that a surety, who seeks to prove under the commission of the principal debtor, in respect of payment subsequent to the bankruptcy, is to make his proof for such sum, as at the time of the bankruptcy the principal debtor was bound to pay or provide. At the time of the bankruptcy *Abraham Sheath* and *Challis Sheath* were each bound to pay or provide a sum equivalent to one third of the ultimate deficiency, and that sum appears to me therefore to be the necessary measure of proof against

1819.

Ex parte
WATSON.
In the Matter
of
SHEATH.

1819. both estates. Proof is equivalent to payment without regard to the amount of dividend; and *Abraham Sheath's* estate and *Challis Sheath's* estate will, in contemplation of law, equally pay the debt of the petitioner by proof, although the estate of *Abraham* should pay 20s. in the pound, and the estate of *Challis* only one farthing in the pound. I cannot, therefore, find the principle upon which the deficiency of dividend upon *Challis's* estate is to create a new debt and new proof against the estate of *Abraham*.

Ex parte
Watson.
In the Matter
of
SHEATH.

I am therefore of opinion that the petitioner is only entitled to prove against the estate of *Abraham Sheath* the elder, one-third of what he has paid on behalf of the Wisbech firm.

LINC. INN, *Ex parte* LOXLEY.—In the matter of GRINSTEAD:
Dec. 24,
1819.

Upon a petition to be paid a dividend, the debt cannot be disputed.

THIS was a petition to be paid a dividend. Affidavits were filed in opposition to it, disputing the debt.

Mr. Horne and *Mr. Wray*, on the part of the assignees, admitted, according to the modern practice, that the debt could not be disputed without a petition for that purpose; but they stated, their clients were ignorant of the late rule, and asked of the court, as an indulgence, to permit the petition to stand over, to give the assignees an opportunity of presenting a petition to impeach the debt.

CASES IN BANKRUPTCY.

457

The VICE CHANCELLOR, in consideration of the circumstances stated to him, directed the petition to stand over, in order that a petition to impeach the debt might be presented.

1819.
Ex parte
Lord, &c.
In the Matter
of
GRINSTEAD.

Mr. Rose appeared for the petitioner.

Ex parte PEELE.—In the matter of FRENCH. MIC. TERM. 1819.

IT was a question in this petition, whether the commission, in which the petitioning creditors were partners, had issued regularly; and the Vice Chancellor had directed an inquiry to be made at the bankrupt office, as to the practice in striking dockets at the suit of partners. This day the following certificate was returned:—

Where partners are petitioning creditors, the practice is for one of them to make the affidavit of the debt; and the partner making the affidavit, alone enters into the bond to the

“ In all cases where a commission of bankruptcy is applied for on the petition of a house in which there are partners, the affidavit is sworn to by one of the partners, stating that the bankrupt is indebted to him and to A. B. and C. D. his partners, and the bond is given to the Lord Chancellor by the party making the affidavit. He alone becomes bound; and the condition is, that the bankrupt F. G. is indebted to the above bounden, and to A. B. and C. D. his partners, in £100, &c.

“ The petition to the Lord Chancellor for

CASES IN BANKRUPTCY.

1819.

Ex parte:
PAUL,
 In the Matter
 of
FRENCH.

" the commission, is the petition of all the part-
 " ners.

*C. Elley.*Secy B^d Office,

27 Jan. 1820.

" The docket papers in the matter of *W.*
French, appear to be conformable to the usual
 " practice.

" C. Elley."

MIC. TERM.
1819.

Ex parte **GARDINER.**—In the matter of
SABATIER.

The petition of the personal representative of a bankrupt who had died after the last meeting of the commission without having surrendered, dismissed.

THIS was the petition of the personal representative of the bankrupt, who died abroad, without having surrendered to the commission. The object of it was to make the assignees account for the surplus of the estate. The commission had issued in 1790, and the bankrupt died in 1817.

Mr. Rose, on the part of the assignees, insisted the court could not entertain the petition.

Mr. Heald and *Mr. Treslove* for the petitioner, said, the court would not hear an assignee say that his accounts should not be investigated; and that as all the creditors had been paid twenty shillings in the pound, the petitioner was entitled to call upon the assignees to account for the surplus.

CASES IN BANKRUPTCY.

459

The VICE CHANCELLOR.

1819.

A bankrupt can never be heard upon petition till he has surrendered to his commission: and his representative ought not to be in a better situation. If this petitioner think that he has any equity, he must apply to the court by bill.

Ex parte
GARDNER.
In the Matter
of
SANDERS.

Petition dismissed.

Ex parte WILBEAM.—In the Matter of
WILBEAM.

LINC. INN,
Dec. 16,
1819.

THE object of this petition was to supersede the commission, on the ground that it had been concerted between the petitioning creditor and the bankrupt's partners, with a view to determine the partnership; and it was alleged, that the bankrupt's partners procured him to be arrested, and prevented him from obtaining bail, in order that he might commit an act of bankruptcy by lying two months in prison. The affidavits in support and in opposition to the petition were conflicting, but there was not evidence of the partners being privy to the issuing of the commission; and there was sufficient evidence on the other side, of the bankrupt having misconducted himself as a partner, by drawing bills in the partnership's name for his own purposes, and by otherwise bringing the partnership firm into discredit; and it also appeared that the partnership firm was indebted to the petitioning creditor to a large amount.

If in issuing a commission the petitioning creditor be influenced by motives not fraudulent, although the mere distribution of the estate, the court will not on that account supersede the commission.

1819.
Ex parte
 WILBEAM,
 In the Matter
 of
 WILBEAM.

Mr. *Hart* and Mr. *Montagu* for the petition argued, that sufficient evidence appeared upon the affidavits, to shew that the object of the petitioning creditor was to work a dissolution of the partnership between the bankrupt and his partners, at the instance of the partners, and therefore the commission could not be supported; and they referred to the case of *ex parte Browne* (a), *ex parte Gallimore* (b), *ex parte Hartcourt* (c), *ex parte Bowes* (d).

Mr. *Bell*, in support of the commission, said, it clearly appeared from the affidavits, that the commission did not issue at the instance of the bankrupt's partners; and he contended, when the petitioning creditor saw the firm upon which he had so large a demand was in the way to be ruined, through the imprudence and misconduct of one of its members, it was competent for him to prevent the failure of the firm, which involved in it the loss of his debt, by issuing a commission against the offending partner.

The VICE CHANCELLOR thought the case was distinguished from those which had been cited; but he deferred giving judgment until he had conversed with the Lord Chancellor on the subject.

Jan. 17, 1820.

The VICE CHANCELLOR.

I have had the opportunity of talking with the Lord Chancellor upon this case, and his lordship is pleased to concur with me in the distinction I took, when the petition was opened. The petition charges that the writ and the arrest, and the subsequent commission

(a) 1 Rose B. C. 151.

(b) 2 Rose B. C. 424.

(c) 2 Rose B. C. 203.

(d) 4 Ves. 168.

against the bankrupt, were the result of a contrivance between the petitioning creditor and the bankrupt's partners, in order to turn him out of the partnership trade. This charge appears to me to be disproved. But then it was insisted, that as the petitioning creditor did not deny that his object in issuing the commission was to determine the partnership, the motive vitiated the commission; and in support of that proposition, the counsel for the bankrupt cited the cases of *ex parte Gallimore*, and *ex parte Harcourt*. A commission of bankrupt, like an action, is, in a qualified sense, one of the legal rights of creditors; and courts of justice, generally speaking, have little to do with the motives of those who assert their legal rights. The great seal however will not suffer a commission to be made the instrument of fraud.

1819.

Ex parte
WILBEAM,
In the Matter
of
WILBEAM.

The case put by the Lord Chancellor in *ex parte Gallimore*, was that of a fraudulent attempt on the part of a landlord, to deprive his tenant of a valuable lease in a colliery, by means of a commission of bankrupt; and in *ex parte Harcourt* the commission was taken out against good faith, pending a negotiation between the parties, and it was the bankrupt's commission. I concur in the principle of both these cases, but here all fraud is disproved. The petitioning creditor appears to have considered it to be a prudent measure to get the bankrupt out of a partnership with which he had extensive dealings. Taking this, *bona fide*, to have been his object, it cannot defeat the commission. A commission is not to be superseded, although there is no fraud, merely because the petitioning creditor has a bye motive beyond the distribution of the estate.

Petition dismissed.

LINC. INN,
March 24,
1820.

Ex parte SHERMAN.—In the matter of
CHAMPNEY. (a)

Lease contain-
ing a proviso
against assign-
ment having
been deposited
by the lessee, to
secure a debt,
ordered on the
petition of the
depository to
be sold under
the lessee's
commission.

THE petition was for the sale of leasehold property, the lease of which had been deposited with the petitioner for securing a debt.

The lease contained the following proviso:

"That if the lessee, his executors, administrators, or assigns, should at any time during the continuance of the demise, lease, sublet, or in any manner part with the possession of the premises, or any part thereof, for all or any part of the said demised term, without the special license in writing of the lessee, his heirs or assigns, first had and obtained, then it should be lawful for the lessor, &c. to re-enter.

For the petition were cited *ex parte Buglehole* (b), *Doe v. Bevan* (c).

The VICE CHANCELLOR said, as there was no clause in the lease, making an act of bankruptcy a determination of the lease, it had been decided that the assignees were entitled to take the lease; but they were to take it subject to the contracts of the bankrupt.

The usual order for the sale was made.

Mr. Whitmarsh for the petition.

Mr. Norton for the respondent.

(a) *Ex relatione*. (b) 1 Rose, B. C. 432. (c) 3 Maul. & Sel. 353.

Ex parte the Corporation of DONCASTER.—In the LINC. INN,
matter of WRIGHT. March 25,
1820.

MR. Pemberton upon this petition being called, requested on behalf of the petitioners, that it might be allowed to stand over to a future day, to afford time for the filing of affidavits in reply. The affidavits in support of the petition were filed on the 25th of January, and those in answer, which were very voluminous, were not filed till the 16th of March, the petition day being on the 20th of that month.

Where respondents are too late in filing their affidavits, the court will let the petition stand over, to give the petitioner an opportunity of replying to them, the respondent paying the costs of the day.

The petition was to stay the certificate, and to supersede the commission.

The VICE CHANCELLOR.

I know no other way of checking the delay that too frequently occurs in the prosecution of petitions in bankruptcy, than by making the party occasioning the delay to pay the costs. I certainly shall not conclude these petitioners. I shall let the petition stand over, to give the petitioners an opportunity of considering the affidavits, and of replying to them if necessary; and as the delay will have been occasioned by the conduct of the respondents, they must pay the costs of the day.

The petitioners having waived the costs, the peti-

1820. tion was ordered to stand over till the next day of petitions. (a)

Ex parte
The Corporation of
Doncaster,
In the Matter
of
WRIGHT.

Mr. *Horne* and Mr. *Rose* for the respondents.

LINC. INN,
March 25,
1820.

Ex parte TRUSTRAM.—In the matter of
TRUSTRAM.

IN this case also the affidavits in answer had been filed very lately. The petition was ordered to stand over till the next day of petitions, to give the petitioner an opportunity of replying. The respondents to pay the costs of the day.

EAST TERM.
1820.

Ex parte HAMMOND.—In the Matter of

It is necessary
for a mortgagee
of premises sold
under a com-
mission, who
wishes to bid
for them at the
sale, to obtain
the leave of the
court for that
purpose.

THE petition was by a mortgagee to be permitted to bid at the sale of the mortgaged premises sold under the commission.

Upon this petition being opened, his honor the Vice Chancellor said he doubted the necessity of presenting petitions in cases of this nature, for as it was

(a) See the next case, *ex parte* Trustram.

always competent to a mortgagee to purchase from the mortgagor the equity of redemption, it did not appear to him that the bankruptcy made any difference in this respect.

1820.

Ex parte
HAMMOND.
In the Matter
of

Mr. Preston, as *amicus curiæ*, stated the general understanding of the profession to be, that it was necessary for the mortgagee to apply to the court for liberty to bid at the sale.

And the cases *ex parte Du Cane (a)* and *ex parte Marsh (b)* having been mentioned, the order was made as prayed, the Petitioner paying the costs of the application, and *Mr. Bickersteth* consenting on the part of the assignees.

Mr. Rose appeared for the Petitioner.

VICE CHANCELLOR.

In the Matter of WILLIAM JAMES ROBERTS.
(c)

Tuesday,
June 2,
1818.

“ **WHEREAS** *Nathaniel Thorley*, late of Webb’s A retiring assignee must pay the costs of the meeting for a new choice, and the costs of his application to retire. If the new assignee do not continue any legal proceedings already commenced, the retiring assignee must pay the costs incurred by them, unless the Master report such costs were properly incurred. The retiring assignee to permit his name to be used in any legal proceedings already commenced, he being indemnified by the new assignee. The indemnity to be settled by the Master.

(a) Ante 18.

(b) 1 Madd. 148.

(c) Ante 231.

1818. " the assignees of the bankrupt's estate and effects,
 In the Matter " did on the 20th day of February last prefer his
 of " petition to the Right Honorable the Lord High
 ROBERTS. " Chancellor of Great Britain. Shewing that on or
 " about the 3d day of March 1813 a commission of
 " bankruptcy was duly issued against the said *Wil-*
 " *liam James Roberts*, under which the said *William*
 " *James Roberts* was duly declared bankrupt, and
 " the Petitioner and *John Bvill* were duly chosen
 " assignees, and the usual assignment was duly exe-
 " cuted to them. That the said *John Bvill* was on
 " the 14th day of August 1816, by order of his Lord-
 " ship, discharged from being an assignee of the es-
 " tate and effects of the said bankrupt. That the Pe-
 " titioner has since retired from business, and now
 " resides at Bath, in consequence whereof he is un-
 " able to attend to his duties as assignee of the said
 " bankrupt's estate and effects, and therefore praying
 " his Lordship that he might be discharged from
 " being assignee of the estate of the said *William*
 " *James Roberts*, and that a meeting of the commis-
 " sioners might be called to proceed to the choice of
 " one or more assignee or assignees, in the stead of the
 " Petitioner, with the other usual directions, the Pe-
 " titioner being ready to account before the commis-
 " sioners, and to deliver to such new assignee or as-
 " signees such part of the estate and effects of the
 " said *William James Roberts* as shall remain in
 " specie in his hands, together with all books, papers,
 " and writings in his custody or power belonging or
 " relating to the said *William James Roberts*, or to
 " his estate and effects; and that his Lordship would
 " make such further order in the premises as to his
 " Lordship shall seem meet. Now, upon hearing, &c.
 " I do order that a meeting of the commissioners

CASES IN BANKRUPTCY.

467

1818.

In the Matter
of
ROBERTS.

“ named in the said commission, or the major part of
 “ them, be forthwith held, of which due notice is to
 “ be given and published in the London Gazette;
 “ and that the petitioner, *Nathaniel Thorley*, be dis-
 “ charged and removed from being the assignee of
 “ the estate and effects of the said *William James*
 “ *Roberts*, and that at such meeting the said com-
 “ missioners do proceed to the choice of one or more
 “ person or persons to be an assignee or assignees of
 “ the estate and effects of the said *William James*
 “ *Roberts*, in the room and stead of the said *Natha-*
 “ *niel Thorley*; and the creditors of the said *William*
 “ *James Roberts* who shall be present at such meet-
 “ ing, are to proceed to such choice accordingly;
 “ and I do order, that after such choice be made, the
 “ said *Nathaniel Thorley* and all other proper parties
 “ do join with the said commissioners in making and
 “ executing a new assignment and conveyance of the
 “ estate and effects of the said *William James Ro-*
 “ *berts* to the person or persons who at such meeting
 “ shall be chosen the new assignee or assignees as
 “ aforesaid; and that the said *Nathaniel Thorley* do
 “ release to them all his right, title, and interest of, in,
 “ and to, the said estate and effects of the said *William*
 “ *James Roberts*, and that the said *Nathaniel Thorley*
 “ do come to an account before the said commissioners
 “ for the estate and effects of the said *William James*
 “ *Roberts* come to the hands of the said *Nathaniel*
 “ *Thorley*, or to the hands of any other person or
 “ persons by his order, or for his use as assignee under
 “ the said commission; and for the better taking the
 “ said accounts, the said *Nathaniel Thorley* and all
 “ other proper parties are to be severally examined
 “ before the said commissioners upon interrogatories
 “ or otherwise touching the matter in question, as

1818. “ they shall think fit, and do produce before the said
In the Matter “ commissioners upon oath all books of account, pa-
of “ pers, and writings in his custody, possession, or
ROBERTS. “ power, relative thereto, as the said commissioners
 “ shall direct. And I do order, that the said *Natha-*
 “ *niel Thorley* do deliver over to the new assignee or
 “ assignees so to be chosen as aforesaid all such part
 “ of the estate and effects of the said *William James*
 “ *Roberts* as upon taking the said account shall ap-
 “ pear to have come to his hands and to be remaining
 “ in specie and undisposed of, together with all books,
 “ papers, and writings in his custody or power, be-
 “ longing or in any wise relating to the said *Wilham*
 “ *James Roberts*, his estate or effects. And I do order,
 “ that the costs of the said meeting for the removal of
 “ the said *Nathaniel Thorley* for the new choice
 “ of an assignee or assignees in his room and stead
 “ for taking the account herein before directed, the
 “ costs of the said new assignment and conveyance,
 “ together with the costs of, and occasioned by, the
 “ present application, be paid by the said *Nathaniel*
 “ *Thorley*, such costs to be settled by the said com-
 “ missioners, in case the parties shall differ about the
 “ same. And I do further order, that if the new as-
 “ signee or assignees when so chosen as aforesaid, do
 “ not continue any action, suit, or petition proceeding
 “ already instituted, that in that case the said *Natha-*
 “ *niel Thorley* do pay the costs so incurred, unless
 “ the Master herein after named report that such
 “ costs were properly incurred; but if they do con-
 “ tinue such action, suit, or petition proceedings, and
 “ it shall be necessary that the said *Nathaniel Thor-*
 “ *ley's* name should be used, that they are hereby at
 “ liberty so to use his name on his being secured and
 “ indemnified by the new assignee or assignees when

“ so chosen as aforesaid against any suit or action, or
 “ petition that may be brought or had against him for
 “ costs by reason or in consequence of the continua-
 “ tion of the name of the said *Nathaniel Thorley* in
 “ the proceedings already instituted, and that it be
 “ referred to *Mr. Courtenay*, one of the Masters of the
 “ Court of Chancery, to take a proper security and
 “ indemnity from the new assignee or assignees when
 “ so as aforesaid chosen, for the purposes before
 “ stated; such indemnity to be also at the expense of
 “ the said *Nathaniel Thorley*, to be settled by the
 “ said Master in case the parties shall differ about
 “ the same.”

1818.

In the Matter
 of
 ROBERTS.

PORTER *versus* COX.

LINC. INN,
June 2,
 1820.

THE Plaintiff in this suit had become a bankrupt.

Mr. Beames on the part of the defendant moved, that the assignees should file a supplemental bill within a certain time, or the bill be dismissed. Notice of the motion had been given to the bankrupt, but not to the assignees. He relied upon *Randall v. Mumford (a)*.

The Plaintiff in a suit becoming bankrupt, the assignees ordered within a fortnight after notice to file a supplemental bill, or the bill to stand dismissed.

The VICE-CHANCELLOR.

The bankrupt has no interest in the suit. All his rights are transferred to his assignees. They repre-

1820.

PORTER
v.
COX.

sent his estate, and the court will never dismiss a suit which may be for the interest of the estate without taking care that they have notice. The assignees must be served with notice of the order, and that unless they file a supplemental bill within a fortnight, let the bill be dismissed.

ORDER.

June 16, 1820.

“ Upon opening of the matter this present day unto
“ this court by *Mr. Beames* of counsel for the defend-
“ ant, it was alleged that it appears by the affidavit
“ of *John Day Blake* that the bill in this cause was
“ filed on the 2d day of May 1818, that the defendant
“ afterwards put in his answer thereto, to which
“ the plaintiff replied on the 14th day of January last;
“ and that the said plaintiff has since become bankrupt.
“ That the assignees of the estate and effects of the
“ said plaintiff, the bankrupt, have not yet filed a
“ supplemental bill in the nature of a bill of revivor
“ against the said defendant. It was therefore prayed
“ that the plaintiff's assignees may file a supple-
“ mental bill on or before the 16th of June next; or
“ that in default thereof the plaintiff's bill may stand
“ dismissed as against the said defendant. Where-
“ upon, and upon hearing the said affidavit, and an
“ affidavit of notice of this motion, this court doth
“ order that the assignees of the plaintiff do within a
“ fortnight after notice hereof file a supplemental bill
“ in the nature of a bill of revivor against the de-
“ fendant, or in default thereof that the plaintiff's
“ bill do stand dismissed out of this court.”

Ex parte FREEMAN.—In the Matter of
HENDERSON and MORLEY.

PREVIOUS to the month of January 1819, the bankrupts carried on business in partnership together, and became indebted to the petitioner and to other persons to a considerable amount. In the month of January 1819, the bankrupts agreed to dissolve partnership, and by deed dated the day of January, such partnership was dissolved, and all the joint stock in trade and effects of the partnership were by such deed assigned to the bankrupt *Henderson*, who thereby covenanted to pay, satisfy, and discharge all debts and demands then owing by such partnership. Subsequent to such dissolution, *Henderson* carried on business at the same premises, upon his own account, and such joint stock and effects became mixed with, and formed part of, his separate stock. On the 3d day of May 1819, a commission of bankrupt was issued against *Henderson* and *Morley*, under which they were declared bankrupts, and assignees were duly chosen of their estate and effects. The petitioner and other persons, who were creditors of the bankrupts previous to their dissolution of partnership, proved their debts against the joint estate of the bankrupts. The petitioner insisted he had a right to elect to prove against the separate estate of *Henderson*, and to have his proof made against the joint estate expunged.

By deed the stock and effects of a partnership are assigned to the continuing partner, who covenants to pay the joint debts. The partners become bankrupts. Held that the joint creditors not having, previous to the bankruptcy, accepted the continuing partner as their sole debtor, have not an election to prove against the separate estate of the continuing partner.

The petition prayed that the petitioner and such other persons as had already proved their debts against the joint estate of the said bankrupts might be at li-

1819.
Ex parte
 FREEMAN.
 In the Matter
 of
 HENDERSON
 and MORLEY.

erty to withdraw their proofs against the joint estate, and to prove their debts against the separate estate of the said *Joseph Henderson*, and to receive dividends thereon rateably and in proportion with the separate creditors of the said *Joseph Henderson*.

The VICE CHANCELLOR.

It having been decided by *ex parte Ruffin* (a), *ex parte Fell* (b), and *ex parte Williams* (c), that what was the joint stock of *Henderson* and *Morley* has, under the circumstances of the case, become the separate estate of *Henderson*, the object of the present petition is to have it declared, that the joint creditors of *Henderson* and *Morley* are entitled to elect to prove, either as joint creditors of the two, or as separate creditors of *Henderson*, and in the latter character to share in competition with his other separate creditors, the former joint estate. This claim of proof against the separate estate did not occur to the counsel, who advised or argued the former cases, to which I have referred; and the question, considered *simpliciter*, is, I think, now to be decided for the first time. There are specialties in all the cases cited at the bar. It is not alleged that the joint creditors in any manner adopted *Henderson* as their separate debtor; and the question simply is, whether the covenant of *Henderson* with *Morley* to pay the joint debts, without any concurrence on the part of the joint creditors, before the bankruptcy, does, *ipso facto*, in the case of bankruptcy, convert these joint creditors into separate creditors of *Henderson*, either absolutely or at their option. It is admitted, that if bankruptcy were out of the question, the joint creditor could not sustain an action at law against *Henderson* alone, upon the

(a) 6 Ves. 119.

(b) 10 Ves. 347.

(c) 11 Ves. 4.

mere naked effect of the covenant. My first difficulty is to apprehend the distinction, in this respect, between bankruptcy and no bankruptcy. I cannot apprehend how the fact of bankruptcy makes a man my creditor who does not otherwise sustain that character. I have always considered it to be essential to proof, that the bankrupt should be indebted to the party proving at and before the bankruptcy. The next difficulty arises in considering whether the joint creditors are, in case of bankruptcy, to be converted by the covenant into separate creditors absolutely, or separate creditors optionally. Upon what principle is it to stand, that a joint creditor who, by the terms of his contract with his debtors, has the first right to the joint estate which may pay him twenty shillings in the pound, is by the mere act of his debtors, without his assent or privity, to lose the benefit of his contract, and be excluded altogether from this joint estate, and thrown upon a separate estate, which may not pay him twenty farthings in the pound. On the other hand, upon what principle is it to stand, that a joint creditor may, after the bankruptcy has happened, elect to take advantage, to the prejudice of other creditors, of a secret act of his debtors, to which he was not party or privy, and by which he was not bound? Where a creditor, in respect of the contract of his debtors, is at law both a joint and a separate creditor, the rule in bankruptcy restrains his legal rights, and compels him, for the benefit of the other creditors, to renounce one of his legal characters. It would not well consist with analogy, that where a creditor is at law merely a joint creditor, he should be permitted, after the bankruptcy, to assume a new character against the principles of law, to the prejudice of the other creditors. The engagement of one partner with

1819.

Ex parte
FREEMAN.
In the Matter
of
HENDERSON
and MORLEY.

1819.

Ex parte
FREEMAN.
 In the Matter
 of
HENDERSON
 and **MORLEY.**

the other to pay the debts of the firm, can, as to the creditors of the firm, be considered only as a proposal that he is willing to become their sole debtor. If they accede to this proposal before the bankruptcy, then a contract to that effect is concluded, and under the bankruptcy they are his separate creditors. But their acceptance of him as their separate debtor, after the bankruptcy, comes too late, for he is then incapable of contract. For these reasons I am of opinion, that the petitioners cannot be considered as separate creditors of *Henderson*. I agree that it may be some hardship upon joint creditors that the joint stock, to which they may have specially given credit, should by the dealing of their debtors with each other, be thus converted into separate estate. That hardship would have been avoided if it could have been held that where, upon a dissolution, one of two partners is to become the sole owner of the joint stock, and it is a part of the consideration, that he shall pay the joint debts, such joint stock shall not, in bankruptcy, be considered as actually converted into his separate estate, unless he has paid the joint debts. The cases of *ex parte Ruffin*, and the other cases of that class which followed it, have established, that the legal principle, which converts the joint estate into the separate estate by the mere force of the contract, is too strong for this equity. (a)

(a) See a similar decision *ex parte Williams* in the Matter of *Hughes* ante 13.

Ex parte

(a)

LINC. INN,
August 7,
1820.

THIS was a petition that the petitioning creditor might be directed to pay his solicitor's bill of costs up to the choice of assignees. There were no assets.

The court has not jurisdiction in bankruptcy to order the petitioning creditor to pay the solicitor's bill up to the choice of assignees.

Mr. Rose for the petitioner made the application upon the ground of the statute providing that the petitioning creditor should carry on the commission at his own expense up to the choice of assignees, when he is to be reimbursed out of the first monies they receive. He stated that he had in many other cases obtained similar orders, when no opposition had been made.

The VICE-CHANCELLOR,

Thought he had no jurisdiction to order the petitioning creditor to pay the bill, that he was personally liable to his solicitor like any other client.

No Order made.

(a) Ex relatione.

LINC. INN,
August 7,
1820.

Ex parte CAPONHURST.—In the matter of
CAPONHURST.

Petition by the bankrupt to supersede the commission dismissed without a counter petition, the commission having been established by an action at law & the bankrupt not appearing.

THIS petition by the bankrupt was to impeach the commission. The court had retained the petition, leaving the bankrupt to bring his action. The result of the action was, to establish the commission.

Mr. Rose, for the assignees, requested the petition might be now dismissed, without putting the assignees to the expense of presenting a counter petition.

No one appearing for the bankrupt, the Vice Chancellor ordered the petition to be dismissed.

LINC. INN,
August 7,
1820.

Ex parte SCHOLEY.—In the matter of
GREENWAY.

A petition may be framed in the alternative, and the respondent cannot call upon the petitioner to elect to proceed for only one of the objects of the petition, unless under special circumstances.

THIS petition was to supersede the commission; or, if the court should be of opinion that it was not a fit case for a supersedeas, then that the present assignees might be removed, and a new choice directed to be made.

Upon the petition being opened, *Mr. Montagu*, for the respondents, insisted that the petitioner ought to be put to his election, as to which of the objects of the petition he intended to rely on. He mentioned a case, *ex parte Bryant*, before the Lord Chancellor,

where a petition was framed in the alternative, and the petitioner was put to his election; but he admitted, that the Lord Chancellor did not lay down any general rule to that effect.

1820.

Ex parte
Scholey,
In the Matter
of
Greenway.

The VICE CHANCELLOR was of opinion that the order in *ex parte Bryant* must have turned upon the special circumstances of the case. He observed that it would be highly inconvenient to establish, as a rule, that a petitioner should not pray, nor the court administer a modified relief, in case the court were of opinion against the petition upon a more extended prayer, and he permitted the petition to proceed; and having decided it was not a case for a supersedeas, the question of the new choice of assignees was then gone into.

Mr. Cullen and Mr. Rose for the respondents.

Ex parte KERSLEY.—In the matter of RUSSELL. LINC. INN,
August 7,
1820.

THREE assignees had been chosen in this commission, which was a country one, to whom the assignment had been made; but one of them had not assented, and refused to act.

The assignment and bargain & sale vacated under the circumstances of the case, without directing a new choice of assignees.

The estates had been sold, but the purchasers refused to complete their purchases without all the three assignees joining in the conveyances. The bargain and sale of the commissioners was only to the two acting assignees.

1820.

Ex parte
KERSLEY,
 In the Matter
 of
RUSSELL.

The object of the petition was to vacate the assignment and the bargain and sale, in order that a new assignment and bargain and sale might be made to the two acting assignees.

Mr. *Christian*, *amicus curiæ*, said, the practice of the London Commissioners was never to make the assignment without the assent of the assignee, who was always present when it was executed.

The only doubt the Vice Chancellor had, was, whether he ought not to give the creditors the opportunity of a new choice of assignees: but it being represented that the estate was very small, the order to vacate the assignment and the bargain and sale was made without directing a new choice.

LINC. INN,
 August 7,
 1820.

Ex parte **KIRK**.—In the matter of **GERTON**.

The court has not jurisdiction in bankruptcy to declare the infant heir of an assignee a trustee of the bankrupt's estate.

AN assignee having died pending a petition against him, Mr. *Duckworth* moved the court to amend the petition, by praying a declaration that his infant heir at law might be declared a trustee of the bankrupt's estate within the statute.

The VICE CHANCELLOR.

It would be useless to amend the petition in the bankruptcy. The case is within the statute relating to infant trustees, and the petition must be so entitled.

Ex parte ATKINS.—In the matter of ATKINS.

LINC. INN,
August 9,
1820.

A COMMISSION had issued against the petitioner and his partners, who were bankers. The petitioner had got his certificate. There were a great many notes of the bank outstanding in the hands of indigent persons; and the petitioner, in order to assist them, and under the supposition that the joint estate would pay twenty shillings in the pound, had taken up the notes at their full value to a large amount. The petition was to prove the notes so taken up under the joint commission.

A partner who after getting his certificate had taken up the notes of the firm, permitted to prove against the joint estate.

Mr. *Montagu* for the petition.

The VICE CHANCELLOR.

I shall refer it to the commissioners to inquire whether the petitioner has paid any, and what sums since his certificate, in respect of the outstanding notes of the firm, and he is to prove for the amount. I make this order upon his affidavit and in the confidence, as he was a partner, that he would not have paid the notes unless the holders had a valid claim upon them against the firm. I must otherwise have directed an inquiry whether these notes were, at the time of the bankruptcy, proveable against the estate.

LINC. INN,
August 9,
1820.

***Ex parte* CROWTHER.**—In the matter of
CROWTHER.

If a bankrupt die without surrendering, a petition presented by his representative to supersede the commission, cannot be heard unless it make out a case that would induce the court to permit a surrender if the bankrupt were living.

THE petitioner was the administrator of the bankrupt, who died abroad, after the third meeting of the commissioners, without having surrendered. The object of the petition was to supersede the commission.

The VICE CHANCELLOR.

Referred to the case of *ex parte Gardiner* (a), where the bankrupt having lived abroad many years, without surrendering to his commission, the petition of his personal representative for an account under his commission was refused. It being suggested, however, that in this case the circumstances had been such that if the death of the bankrupt had not happened, he would have been permitted to surrender, the petition was ordered to stand over to the next day of petition, with liberty for the petitioner to amend, by stating a case for a surrender.

Mr. Bell and Mr. Girdlestone for the petitioners:

Mr. Collinson for the respondent.

LINC. INN,
August 9,
1820.

Ex parte RICHARDSON.—In the matter of
CHESHIRE.

Stock standing in the Accountant General's name, is mortgaged to secure a debt, the Accountant General is the mortgagee. The stock is claimed by the

Stock standing in the Accountant General's name, is mortgaged to secure a debt, the Accountant General transfers the stock to the mortgagor without the privity of the mortgagee. The mortgagor then becomes bankrupt. Held that the stock could not be claimed by the assignees, under the 21 Jac. I. c. 19, s. 10 & 11.

(a) Ante 452.

of £3000 Bank 3 per cent. reduced annuities, upon trust, to pay and apply the interest, dividends, and produce thereof, or so much thereof as they might think necessary in or towards the maintenance, education, and bringing up of his grandsons *George Cheshire*, *Joseph Cheshire*, and *Thomas Cheshire*, and his granddaughter *Sophia Cheshire*, until they should attain their age of twenty-one years; and when and so soon as they should attain their said ages, upon trust to pay or transfer to each of them a full fourth part or share, of the said sum of £3000 stock, and all accumulated interest, dividends, and produce to and for his and their own and absolute use and benefit. And in case of the death of any or either of his grandchildren under the said age, and unmarried, he thereby declared it to be his will, that the share or shares of him, her, or them so dying, should go to the survivors (if more than one) equally share and share alike, or the survivor if only one.— And he appointed his wife *Ann Cheshire*, and the said *Joseph Lucas*, and *William Hayward*, executors of his will. *Ann Cheshire*, *Joseph Lucas*, and *William Hayward*, after the testator's death, duly proved the will in the proper ecclesiastical court. *Ann Cheshire* afterwards died; and *George Cheshire* the grandson died an infant under the age of twenty-one years, and unmarried, whereby *Joseph Cheshire*, *Thomas Cheshire*, and *Sophia Cheshire*, became entitled to one third part or share of the said sum of £3000 bank 3 per cent. reduced annuities. In the month of May, 1818, *Thomas Cheshire* having occasion to borrow the sum of £600, applied to, and requested the petitioner to advance and lend him the same; and proposed to give to the petitioner such security upon his share of this sum of £3000 reduced annuities.

1820.

Ex parte
RICHARDSON
In the Matter
of
CHESHIRE.

1820.
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Ex parte
 RICHARDSON,
 In the Matter
 of
 CHESHIRE.

ties; and the petitioner having advanced and lent to *Thomas Cheshire* the sum of £600, in order to secure the repayment thereof, with interest; *Thomas Cheshire* duly executed an indenture of assignment, bearing date the 16th day of May, 1818, and made between *Thomas Cheshire* of the one part, and the petitioner of the other part; and thereby, after reciting the said will of the said testator *George Cheshire*, the death of the said testator's wife *Ann Cheshire*, and the death of the said *George Cheshire* the grandson; and that *Thomas Cheshire* was then entitled to one third part of the said sum of £3000 stock 3 per cent. reduced annuities: and further reciting, that parts of the personal estate and effects of *George Cheshire* the grandson being, in consequence of said institution in the High Court of Chancery, under the management and control of that court; *Joseph Lucas*, the surviving executor of the will of the said testator, was then unable to pay or assign over to *Thomas Cheshire* his third part of the £3000 stock; and that *Thomas Cheshire* having immediate occasion for the sum of £600, had requested the petitioner to advance and lend him the same at interest, which the petitioner had agreed to do, on having such assignment by way of mortgage, for securing the repayment thereof, with interest, as therein after mentioned. It was witnessed, that, in pursuance of the said agreement, and in consideration of the sum of £600 of lawful money of Great Britain to *Thomas Cheshire*, paid by the petitioner, *Thomas Cheshire* did bargain and sell, assign, transfer, and set over to the petitioner, his executors, administrators, and assigns—All that his full third part or share of and in the said principal sum of £3000 stock, and all accumulated interest, dividends, and produce, then due or thereafter to be-

come due thereon. And all other the parts, shares, money, estate, and interest, as well original as accruing of him the said *Thomas Cheshire*, as a legatee or *cestuique* trust, named in the will of the said *George Cheshire*, or as one of the next of kin of the said *George Cheshire*, the grandson, of and in their respective personal estates and effects, and of and in all stocks, funds, or securities, in or upon which the same or any part thereof then were, or should or might thereafter be placed out or invested: And also all the right, title, interest, property, claim, and demand whatsoever, both at law and in equity of him the said *Thomas Cheshire*, party thereto, of, in, to, and out of the said parts, shares, monies, and premises thereby assigned or expressed, and intended so to be, together with all powers, remedies, and means whatsoever requisite or necessary for recovering, receiving, and giving effectual releases and discharges for the said parts, shares, and premises thereby assigned or expressed and intended so to be, and every part thereof, respectively to have and to hold, receive, and take the parts, shares, monies, and all and singular other the premises thereby assigned unto the petitioner, his executors, administrators, and assigns, as and for her and their own monies and property, absolutely subject nevertheless to the proviso or condition hereinafter contained, that is to say, provided always, (and the said indenture was upon this express condition), that if the said *Thomas Cheshire*, his executors, administrators, or assigns, did and should well and truly pay, or cause to be paid unto the petitioner, her executors, administrators, or assigns, the full and just sum of £600 of lawful money of Great Britain, together with interest for the same of like lawful money, at and after the rate of £5 for £100 for a year on the 16th day of

1820.

Ex parte
RICHARDSON
In the Matter
of
CHESHIRE.

1820. August then next ensuing the date thereof, without making any deduction or abatement whatsoever, out of the same or any part thereof, on any account whatever; then and at any time or times thereafter the petitioner, her executors, administrators, or assigns, should and would upon the reasonable request, and at the costs and charges in all things of him the said *Thomas Cheshire*, party thereto, his executors, or administrators, reassign and retransfer or release to him or them, or whom he or they should direct, all the said parts, shares, monies, and premises by the said indenture assigned or intended so to be: And all the estate and interest of the petitioner, her executors, administrators, or assigns, therein freed and discharged from all incumbrances whatsoever, made, done, or committed by her or them. At the time of the date of the said indenture, the sum of £2525 bank 3 per cent. reduced annuities, was standing in the name of the Accountant General, of the Court of Chancery, in trust, in a cause of *Cheshire v. Lucas*, which was instituted for the purpose of obtaining an account and distribution of the estate and effects of the testator *George Cheshire*: And *Thomas Cheshire* was a party complainant in the said cause. By a decree or decretal order of the High Court of Chancery, bearing date the 6th of Feb. 1819, and made in the said cause *Cheshire v. Lucas*, and in the causes of *Cheshire v. Dell*, and *Willis v. Cheshire*, which were supplemental thereto, it was amongst other things ordered, that the sum of £1000 reduced annuities, part of the said sum of £2525 reduced annuities, should be transferred to *Thomas Cheshire*, for his third part of the said sum of £3000 like annuities bequeathed to him by the said testator's will. The said sum of £1000 bank 3 per cent. reduced annuities, was the

same stock which, by the indenture of the 16th day of May, 1818, was assigned to the petitioner by way of mortgage. On the 13th day of Aug. 1819, the solicitor of *Thomas Cheshire* by his order, wrote and sent a letter of that date, to Messrs. Rose and Slater, his agents in London, and thereby desired that a power of attorney for the sale of the said sum of £1000. bank 3 *per cent.* reduced annuities, might be obtained and sent for the execution of *Thomas Cheshire*, as soon as the transfer of the stock was made, in order that the stock might be immediately sold, and that the money arising from the sale might be applied in payment of what was due to the petitioner on the said security. In consequence of this letter, Messrs. *Rose and Slater* renewed the applications at the office of the Accountant General, of the Court of Chancery, which had been previously made, to have the stock transferred into the name of *Thomas Cheshire*: And Messrs. *Rose and Slater* were thereupon informed that such transfer could not be made till after the long vacation; but notwithstanding such information, the Accountant General having afterwards occasion to go to the Bank, did on the 19th day of the said month of August, 1819, transfer the £1000 bank 3 *per cent.* reduced annuities into the name of *Thomas Cheshire*. It appeared that *Thomas Cheshire*, up to the time of his bankruptcy, was entirely ignorant of such transfer, and never accepted the same. That no notice of the transfer was given to Messrs. *Rose and Slater*, and they remained ignorant thereof until the re-opening of the Accountant General's office, in the latter end of the month of October, 1819; and in the mean time, during the long vacation, *Thomas Cheshire* committed the act of bank-

1820.

Ex parte
 RICHARDSON
 In the Matter
 of
 CHESHIRE.

1820. ruptcy, upon which the commission against him was issued, bearing date 18th December, 1819.

Ex parte
RICHARDSON
In the Matter
of
CHESHIRE:

The petition was to have the £1000 reduced annuities sold and applied in discharge of the debt due to the petitioner; and if it should not prove sufficient for that purpose, for leave to prove for the remainder.

Mr. Heald and Mr. Bickersteth for the petitioner.

According to the true construction of the statute of *James (a)*, it is impossible the £1000 reduced annuities can be considered as being in the ordering and disposition of the bankrupt at the time when the act of bankruptcy was committed; for the words of the act are, "That if at any time hereafter any person or persons shall become bankrupt, and at such time as they shall so become bankrupt shall, by the consent and permission of the true owner and proprietary have in their possession, order, and disposition, any goods or chattels, whereof they shall be reputed owners, and take upon them the sale, alteration, or disposition as owners, that in every such case the said commissioners, or the greater part of them, shall have power to sell and dispose of the same, &c." Now, by the terms of this act of parliament there are two conditions precedent to the authority given to the commissioners to sell and dispose of the goods and chattels in the possession of the bankrupt at the date of the bankruptcy. The one is, that the possession, order, and disposition of the goods and chattels must

(a) 21 Jac. I. c. 19, s. 10 and 11.

be with the consent and permission of the true owner and proprietary. Mrs. *Richardson*, the Petitioner, was the true owner and proprietary of the stock in question; but neither she nor Messrs. *Rose* and *Slater*, her agents, knew that the Accountant General had made the transfer until the office re-opened after the long vacation, and the transfer was not made with her privity, so that the first condition required by the statute of *James* as precedent to the commissioners' power to deal with the property for the benefit of the creditors fails in this case; for if the transfer was made without the privity of the petitioner, it cannot be said that the stock was in the bankrupt's possession by the consent and permission of the true owner. It is also necessary that the bankrupt should have the goods and chattels in his "possession, order, and disposition;" but how can stock be in the order and disposition of a person who is altogether ignorant of its standing in his name. He could not "take upon himself the sale, alteration, or disposition as owner," because he was not aware of his power. Therefore, in this case, both the terms fail, and the stock cannot be sold for the benefit of the creditors.

1820.
Ex parte
RICHARDSON
In the Matter
of
CHESHIRE.

Mr. *Hart* and Mr. *Rose*, for the assignees, contended, it was the duty of the petitioner, upon the execution of the assignment, to have given notice thereof to the Accountant General; and that as such notice had not been given, the transfer must be taken to have been made with the "consent and permission" of the petitioner, which would satisfy the exigency of the statute of *James*.

The VICE CHANCELLOR.

In this case, the bankrupt being entitled to an un-

1820.

Ex parte
RICHARDSON
 In the Matter
 of
CHESHIRE.

certain interest in funds standing in the cause of the Accountant General to the credit of a cause in the court, in May, 1818, assigns that uncertain interest to Mrs. *Richardson* as a security for £600 lent by her to him: Mrs. *Richardson* was in truth a purchaser of the whole of the bankrupt's interest, for the money she advanced is admitted to exceed the value of such interest. When this assignment was made, the property was not in the possession, order, and disposition of the bankrupt; but on the 19th of August, 1819, the Accountant General transferred £1000 reduced stock into the name of the bankrupt, and it is argued that from that time the stock was in his possession, order, and disposition. But for the purpose of defeating the claim of a *bona fide* purchaser it must be shown that such possession, order, and disposition of the bankrupt was by the consent and permission of the true owner. It is not pretended that the petitioner, the true owner, was personally acquainted with the fact of the transfer, but it is said the transfer was made with the knowledge of Messrs. *Rose* and *Slater*, the agents of Mr. *Rose* of Aylesbury her solicitor, and that the knowledge of the agent is the knowledge of the principal. A young gentleman in Messrs. *Rose* and *Slater's* office swears that on the 15th of August he was informed at the Accountant General's office that the stock could not be transferred till after the long vacation. And there is no evidence that any of the parties were aware of the actual transfer till the Accountant-General's office was opened after the long vacation, and in the meantime the act of bankruptcy had been committed. I am therefore of opinion, that taking the stock to be goods and chattels within the statute, and to have been in the possession, order, and

disposition of the bankrupt at the time he became bankrupt, that such possession, order, and disposition was not with the consent of the true owner, and that the petitioner is entitled to it. I do not think this is a case for costs on either side.

1820.

Ex parte
RICHARDSON
In the Matter
of
CHESHIRE.

Ex parte RADCLIFFE in re GUNTON. (a)

LINC. INN,
Aug. 9 & 10,
1820.

THIS was a petition presented to stay the bankrupt's certificate, and the affidavits in support of it were regularly filed.

If upon a petition to stay a certificate the bankrupt do not file his affidavits in answer till after the petition day, the petitioner is entitled to have the petition stand over, that he may have an opportunity of replying to any new matter in the bankrupt's affidavits.

The bankrupt's affidavits in answer were sworn on the 22d of May, but not filed until the 2d of August, *viz.* after the petition day.

When the petition was called on, Mr. Montagu prayed that it might stand over to the next day of petitions, for the purpose of replying to these affidavits; and the Vice Chancellor granted the application.

On the next day, Mr. Whitmarsh, for the bankrupt, applied, that the petition might come on, upon the ground, that the rule of the court in the case of petitions to stay certificates, was, that the petitioner was not entitled to file affidavits in reply without the especial permission of the court, after first hearing the petition and being *itself* satisfied, that, from the new

(a) Ex relatione.

Ex parte
RADCLIFFE
in re
GUNTON. matter inserted in the affidavits in answer, further evidence was necessary, and the following cases were cited as establishing such a practice, viz. *ex parte Gardner (b)*, *ex parte Dodson (c)*, and *ex parte Peel (d)*.

The VICE CHANCELLOR stated, that if a petition be presented to stay a certificate supported by affidavit, which is answered by the bankrupt, and the petitioner afterwards, and before the hearing, file an affidavit in reply, confined to new matter, the court at the hearing will not reject such affidavit because filed without leave of the court. But if such petitioner at the hearing asks that the petition may stand over in order that he may file an affidavit in reply, the court will not permit the further delay without exercising its own judgment as to the propriety of the affidavit in reply. In the present case the bankrupt, though he had sworn his affidavits before, having lain by, and not filed them till after the petition day, the petitioner is entitled to have the petition stand over, in order that he may have an opportunity of considering the propriety of replying to the bankrupt's affidavits.

LINC. INN,
Aug. 10,
1820. *Ex parte ROGERS.*—In the Matter of BOWLES.

Notes bought up after the bankruptcy of the maker can not be proved unless it be shewn that the persons from whom they were purchased were individually entitled to a proof in respect of the notes.

THE petitioner's testator had bought up after the bankruptcy of the Salisbury bank, their outstanding notes, from various holders. This petition was to prove the amount of the notes so bought up, the commissioners having refused the proof under the idea, as was stated, that the notes being purchased after the

(b) 1 Rose B.C 378.

(c) Ante 178.

(d) Ante 394.

bankruptcy, a proof would not lie. There was no evidence from whence the petitioner bought the notes, or that they were the subject of proof in the hands of the former holders.

Ex parte
ROGERS
In the Matter
of
BOWLES.

The VICE CHANCELLOR.

I cannot make an order according to the prayer of the petition. There can be no proof in respect to these notes unless it be established, that at the time of the bankruptcy, they were in the hands of holders, who were entitled to prove them under the commission. The only order I can make will be to allow the petitioner to go again before the commissioners, for the purpose of shewing that his testator purchased the notes from *bona fide* holders, entitled to a proof in respect of the notes they individually held.

The case of the Portsmouth bank was mentioned, where the sailors of several ships had received their wages and prize monies in the notes of that bank, and the Admiralty, to prevent discontent in the fleet, had taken up the notes from the sailors, and afterwards applied to prove the amount against the estate of the bank; upon which occasion the Lord Chancellor made the order, with a direction that the Admiralty should not interfere in the choice of assignees.

The VICE CHANCELLOR said the special circumstances of that case were considered as sufficient evidence that the notes were proveable against the estate.

Mr. Tinney for the petition.

Mr. Collinson for the assignees.

LINC. INN,
Aug. 10,
1820.

Ex parte SMITH.—In the matter of SHEATH.

Proof cannot
be mounted on
proof.

THE same point arose in this petition as had been decided in this bankruptcy upon the petition *ex parte* Watson (a).

Mr. Montagu now stated to the court, that the Lord Chancellor had, in a very late case (b), adopted a different principle of decision from that which his honor had come to in *ex parte* Watson.

Mr. Rose said, he was engaged in the petition referred to by Mr. Montagu, and did not understand the Lord Chancellor to have pronounced the order as stated by Mr. Montagu, and if the minutes were taken down to that effect, his clients would certainly request to have them rectified.

The VICE CHANCELLOR.

The short ground of my decision in *ex parte* Watson was this: I considered proof to be equivalent to payment, and that the circumstance of either estate paying a larger or a smaller dividend, could not upon any principle cause a new proof against the other estate, and thus mount proof upon proof.

The same order was made as in *ex parte* Watson, with the addition of a reference to the commissioners, to approve of an indemnity as to partnership debts not actually paid.

(a) Ante 449.

(b) *Ex parte* Hunter, *infra*.

Ex parte BARBER.—In the Matter of SHAW.

LINC. INN,
Aug. 11,
1820.

THE object of this petition was to supersede the commission, which had issued on the petition of the husband, for a debt due to his wife when *sole*; and that another might issue on the petition of the husband's wife.

Petitions to supersede commissions must be served on the bankrupt.

It appeared that the bankrupt had not been served with the petition.

Mr. *Montagu* said, that it being the intention to issue another commission, there was not any necessity of serving the bankrupt, as it must be perfectly immaterial to him whether his estate was distributed under the one or the other commission.

The VICE CHANCELLOR.

Said it was a general rule, that the bankrupt must be served with every petition to supersede his commission. He was plainly interested in every such question.

Petition stood over to serve the bankrupt.

Ex parte HARVEY.—In the Matter of
HUMPHREYS.

LINC. INN,
Dec. 21,
1819.

THE petitioners were purchasers of the bankrupt's copyhold estates sold under the commission. In order the bankrupt out of the bargain and sale, and convey them directly to the purchasers.

The commissioners may except the copyhold estates of

1819.
Ex parte
HARVEY
 In the Matter
 of
HUMPHREYS.

to save the expense of two fines, the commissioners had excepted out of the bargain and sale to the assignees the copyhold estates, and it was proposed that the commissioners should convey the estates to the purchasers. To this the petitioners objected, and insisted that, by the various acts of parliament, it was imperative upon the commissioners to convey the estates in the first instance to the assignees, who were the proper parties to convey to the purchasers. On the other hand, the assignees relied upon Lord *Hardwicke's* recommendation in *Drury v. Man* (a), and the subsequent practice of commissioners and conveyancers, which was said always to be in conformity with that recommendation.

The VICE CHANCELLOR thought a practice originally adopted under the authority of Lord *Hardwicke*, and which had become the foundation of so many titles, ought not now to be disturbed. He also said, if the case were new, he should hold, that the commissioners were authorized to convey copyhold estates directly to purchasers, and that it was not necessary they should convey to the assignees. That the direction in the statute, that the commissioners should convey to the assignees was substantially answered by a conveyance to their appointment, and that the expression "no other person," in the statute of *Anne*, meant only "no person not chosen by the creditors," and prevented the commissioners making assignees at their pleasure.

Mr. Sugden and Mr. Buck for the petition.

Mr. Bell and Mr. Rose for the assignees.

(a) 1 Atk. 95.

WACKERBARTH v. POWELL.

LINC. INN,
July 10,
1820.

THE bill in this cause was, by the creditors of *Richard Baldwin* deceased, to have the account of his estate taken and to have it administered in the usual way. At the hearing of the cause, it was amongst other things referred to the Master to take an account of what was due to the plaintiffs and the other creditors of *Richard Baldwin*, distinguishing the debts by specialty from those by simple contract. The Master by his report found, that on the 23d of September, 1799, a commission was issued against *John Cox* and *Frederick Heisch* of New-Court, Crutched Friars, London, merchants, dealers, chapmen, and co-partners, under which they were duly declared bankrupts, and that on the 24th of September, 1799, the estate of the said bankrupts was assigned provisionally to *Thomas Vaughan* of Chancery Lane, London. And that on the 8th day of October in the same year, at a public meeting holden for the choice of assignees, *John Wackerbarth*, *Benedict Paul Wagner* of London, merchant, and *Richard Baldwin*, since deceased, the testator, were duly chosen assignees of the estate and effects of the said bankrupts; and by an indenture of assignment dated on the same day, and made between the said *Thomas Vaughan* of the first part, the major part of the commissioners in

The creditors of a bankrupt appoint the Bank of England as the place where the estate shall be deposited. A dividend is declared. Two of three assignees sign drafts for the dividends, which they forward to the other assignee for his signature. He also signs them and receives the money, which he applies to his own purposes. Upon his death a creditor's suit is instituted for the administration of his assets. Held, 1st, that under the covenant which the assignees entered into with the commissioners, the misapplied dividends were a special contract debt due

from the estate of the assignee who had misapplied them to the estate of the bankrupt. 2dly, That the estate of the assignee was liable under the 49 Geo. 3, c. 127 §. 4, to pay 20 per cent. upon the funds misapplied. 3dly, That the 20 per cent. was not a specialty, but a simple contract debt. 4thly, That the 20 per cent. was part of the general estate of the bankrupt, and did not belong to the creditors entitled to the misapplied dividends.

1820.
 WACKER-
 BARTH,
 v.
 POWELL.

the said commission named of the second part, and the said *John Wackerbarth, Richard Baldwin, and Benedict Paul Wagner* of the third part: the estate of the said bankrupts was duly assigned to the said *John Wackerbarth, Benedict Paul Wagner, and Richard Baldwin*, in trust for themselves and the rest of the creditors of the said bankrupts; and he found that on the 1st day of May, 1802, a commission of bankrupt was issued against the said *Benedict Paul Wagner*, under which he was duly declared a bankrupt; and that at a meeting of the creditors of the said *John Cox* and *Frederick Heisch* held at Guildhall the 19th April, 1803, pursuant to notice in the London Gazette, the said *John Wackerbarth* and *Richard Baldwin* were appointed sole assignees; and by indenture of assignment dated on the same day, and made between the said *Benedict Paul Wagner* of the first part, *Andrew Casper Giese, Robert Lee, and Samuel Rees Ellis*, assignees of the said *Benedict Paul Wagner* of the second part; the major part of the commissioners under the said commission against the said *John Cox* and *Frederick Heisch* of the third part; and the said *John Wackerbarth*, and the said *Richard Baldwin* of the fourth part, it was witnessed that for the considerations therein mentioned, the said *Benedict Paul Wagner*, and the said *Andrew Casper Giese, Robert Lee, and Samuel Rees Ellis*, assigned all the personal estate of the said *John Cox* and *Frederick Heisch* in the possession of the said *Benedict Paul Wagner*, and all the interest of them the said *Andrew Casper Giese, Robert Lee, and Samuel Rees Ellis*, to the said *John Wackerbarth* and *Richard Baldwin*, their executors and administrators, and that the said assignment was

ratified and confirmed by the said commissioners; and in the said indenture was contained a covenant whereby they the said *John Wackerbarth* and *Richard Baldwyn*, and each of them for himself separate and apart, and for the acts and deeds of his own heirs, executors, and administrators, did thereby severally and respectively covenant, promise, and agree to, and with the said commissioners, that each of them the said *John Wackerbarth* and *Richard Baldwyn*, and their respective executors, administrators, and assigns should and would in the meantime, and until such dividend or dividends should be made as thereafter mentioned, as and when the money to be received by them, or either of them, from or out of the said bankrupts' estate and effects should amount to the sum of £100 or upwards, pay the same in the joint names of them the said assignees into the hands of the governor and company of the Bank of England for safe custody, there to remain for the benefit of the creditors of the said *John Cox* and *Frederick Heisch*, and subject to the orders of the said commissioners, or the major part of them: and further, that each of them the said *Richard Baldwyn* and *John Wackerbarth*, their executors, administrators, and assigns, should and would from time to time, and at all times thereafter, upon reasonable request and notice in writing to them given for that purpose, under the hands of the commissioners in the said commission, or any renewed commission which might be awarded against the said *John Cox* and *Frederick Heisch*, authorized as aforesaid, or the major part of them, render and give to such commissioners, or the major part of them, a true, just, and perfect account in writing of all and every such sum and sums of money, or other satisfaction as the said *John Wackerbarth*

1820.

WACKER-
BARTH,
v.
POWELL.

1820.

WACKER-
BARTH,
v.
POWELL.

and the said *Richard Baldwyn*, their executors, administrators, and assigns respectively should have had, recovered, and received by virtue of the said deed of assignment, or otherwise out of the estate of the said *John Cox* and *Frederick Heisch*, and all such monies or other satisfaction as should appear to be so by them respectively had and received as aforesaid, they the said *John Wackerbarth* and the said *Richard Baldwyn* should and would, after all just allowances thereout deducted, and at the like reasonable request well and truly pay, satisfy, and render, or cause to be paid, satisfied, and rendered unto them the said commissioners by the said commission, or by any renewed commission authorized as aforesaid, or the major part of them ordered, disposed, distributed, and divided amongst all and every the creditors of the said *John Cox* and *Frederick Heisch*, who had sought, or should seek relief by virtue of the said commission, according to the directions of the several statutes therein mentioned, proportionably according to the several debts owing to them respectively.

And he found that the said *John Wackerbarth* and the said *Richard Baldwyn*, as such assignees as aforesaid, in performance of the said covenant, from time to time, paid into the Bank of England various sums of money to a very large amount in the whole, which came to their hands by virtue of the said assignment, and that on the 28th day of February, 1800, a dividend of 4s. in the pound was declared under the said commission, of the joint estate of the said *John Cox* and *Frederick Heisch*; and that on the 30th day of July, 1803, another dividend of 3s. 4d. in the pound of the said joint estate was declared, under the said commission, amongst such of the cre-

ditors who had proved or claimed debts since the said first order of dividend, and had not been included therein. And he found, that on the 8th day of November, 1806, another dividend of the joint estate was declared, of 4s. in the pound, upon those debts which were not included in the previous orders of dividend, and of 8d. in the pound upon those debts which were comprized only in the order of dividend of the 30th day of July, 1803; and that on the said 30th day of July, 1803, a dividend of 4s. in the pound on the separate estate of the said *John Cox* was declared under the said commission; and on the 30th December, 1806, a further dividend of 11s. in the pound was declared of the said separate estate.

1820.
WACKER-
BARTH,
v.
POWELL.

And he found that the following plan was adopted for the payment of the said dividends, that is to say, printed drafts upon the Bank of England were prepared or filled up for each creditor's dividend, to be signed by the assignees for the time being; and such of the said drafts as were so prepared and signed, prior to the bankruptcy of the said *Benedict Paul Wagner*, one of the said assignees, were signed by the said *John Wackerburth* and *Benedict Paul Wagner*, as two of such assignees; and that such of the said drafts as were signed after the bankruptcy of the said *Benedict Paul Wagner*, were signed by the said *John Wackerbarth*, as one of the said assignees: and that all of the said drafts being so signed, were left with the said *Richard Baldwyn*, as one other of the said assignees, to be signed by him also and delivered over to the respective creditors, for whose dividend the same respectively were made and signed, when such creditors should apply for payment of their respective dividends: and that the said receipts for such dividends respectively, and also orders for the same

1820.
—
WACKER.
BARTH,
v.
POWELL.

dividends respectively, addressed to the said *Richard Baldwyn*, were prepared and left with the solicitors to the said assignees; the said receipts and orders respectively being marked or numbered with figures or numbers to correspond with the like figures or numbers with which the said drafts were marked or numbered: and that upon application to the said solicitors by the said creditors for payment of their respective dividends, such creditors were required to sign the said receipts so prepared for their respective dividends as aforesaid; and that thereupon the corresponding orders so prepared as aforesaid, were respectively delivered to such creditors accordingly, who were directed to call upon the said *Richard Baldwyn* for the drafts for their respective dividends; and that it was the duty of the said *Richard Baldwyn* as one of the said assignees, to sign such drafts, and deliver the same to the said respective creditors when applied for.

And he found that the said *Richard Baldwyn*, being such assignee, received payment of the sums of money mentioned in several of such drafts, which had been so left in his hands, and applied the same to his own use, at the following dates, that is to say, on the 14th of March, 1800, the sum of £212 : 10 : 8; on the last day of June, 1802, the sum of £142 : 10 : 3; on the last day of Sept. 1803, the sum of £657 : 14 : 9 on the 10th of March, 1804, the sum of £92; on the 14th of January, 1807, the sum of £589 : 15 : 0; and on the 16th of January, 1807, £288 : 0 : 8; making together the sum of £1982 : 11 : 4.

And that he had therefore thought fit to allow the claim of the said plaintiffs, as creditors by specialty, of the said *Richard Baldwyn*, for the amount of

£1982:11:4 as set forth in the first part of the said schedule to that his report annexed.

1820.

WACKER-
BARTH.
v.
POWELL.

Mr. *Wingfield* and Mr. *Roupell* for *Wackerbarth*, the surviving assignee of the estate of *Cox* and *Heisch*, contended that the £1982:11:4 was a specialty debt, and that the estate of *Richard Baldwyn* under the statute (a) ought to be charged with £20 per cent. upon it.

Mr. *Agar* and Mr. *Roots*, for the other creditors of *Richard Baldwyn*, argued against the application of the act; but they contended that even if the act did apply to the case, yet that the court had not jurisdiction upon a bill in equity, to decree the payment of the £20 per cent. which being in the nature of a penalty, could only be given upon petition in the bankruptcy, against the offending party himself. And they insisted that all penalties died with the individual, and could not be enforced against the estate or representatives after his death.

Mr. *Shadwell* and Mr. *Glyn* for the executors. In order to make this £1982:11:4 a specialty debt, there must have been an infraction of the covenant. The covenant is "that they the assignees will, when
" the money to be received by them, or either of them,
" from or out of the said bankrupt's estate and effects,
" should amount to the sum of £100 or upwards, pay
" the same in the joint names of them the said assignees, into the hands of the governor and company
" of the Bank of England, for safe custody; there to

(a) 49 Geo. III. c. 121. s. 4.

1820.
 WACKER-
 BARTH,
 v.
 POWELL.

" remain for the benefit of the creditors of *Cox* and "*Heisch*, and subject to the orders of the commissioners." It is not denied that the money was paid into the Bank of England, but it is said, the money was not suffered to remain there subject to the orders of the commissioners. This we deny: for the master has found that a plan was adopted of drawing out the money from the Bank of England, in a particular manner, by printed drafts, prepared or filled up for each creditor's dividend, to be signed by the assignees. The money was to remain in the Bank of England till it was drawn out according to the adopted plan. It was drawn out in conformity with that plan, and although it is perfectly true, that Mr. *Baldwyn* misappropriated the money, and was thereby guilty of a breach of trust, yet there was no infraction of the covenant, for the money was paid into the Bank of England, there to remain subject to the order of the commissioners; and at last was only drawn out according to the plan approved by them.

Sir *Samuel Romilly's* act (a) directs that assignees who retain or employ for their own benefit the estates of bankrupts, contrary to the act of Geo. II. (b), shall be charged in their accounts with interest, at the rate of £20 *per cent.* upon the money retained. It therefore becomes necessary to refer to the act of Geo. II. to see whether Mr. *Baldwyn* has so conducted himself, that his estate is to be charged with £20 *per cent.* in respect of the £1982:11:4. It appears by the recital in the 32d section of the act, that delay in making the dividend was the mischief

(a) 49 Geo. III. c. 121. s. 4.

(b) 5 Geo. II. c. 30. s. 32.

against which it was intended to provide; and it is therefore enacted that the creditors, if they think fit, shall direct in what manner and where the monies arising from the estate shall be paid in and remain until the same shall be divided. The object of the act was to prevent a tampering with the estate, in its passage to the place of deposit; and the act does not relate to any breach of trust, by the misapplication of the funds, after they have reached that place. We admit Mr. *Baldwyn* was guilty of a fraud, but not of a breach of the act of parliament, as he did not misapply the estate of the bankrupt; for immediately upon the order of dividend the fund so divided ceased to be his estate, and became the estate of the creditor.

1820.
WACKER-
BARTH,
v.
POWELL.

But if the court should think that the £1982 : 11 : 4 must rank as a specialty debt, and also that Mr. *Baldwyn's* estate must be charged with £20 *per cent.* in respect of the misapplication of that sum, then we contend that, at the utmost, the estate is only to be charged with five *per cent.*, part of the £20 *per cent.* as a specialty debt, and that the remaining £15 *per cent.* is merely a simple contract debt. For if the commissioners had in Mr. *Baldwyn's* lifetime charged him with £20 *per cent.* the sum so charged, if there had been no covenant, would have been a simple contract debt; but the covenant is to pay the monies, which he shall receive, into the Bank of England, there to remain, &c. so that in respect of his covenant he can only be charged with the usual rate of interest upon the sum misapplied, and the residue of £15 *per cent.* would still remain merely a simple contract debt.

1820.

The VICE CHANCELLOR.

WACKER-
BARTH,
v.
POWELL.

This is a case of great novelty and of very considerable difficulty. The thirty-second section of the fifth of George the Second, to which the forty-ninth of his late Majesty refers, is to this effect, "Whereas, by reason of the monies which are lodged in the hands of assignees until a dividend is made, assignees do oftentimes delay the dividing thereof, to the very great prejudice of the bankrupt's creditors; for preventing whereof, and to the end assignees may make speedy dividends of the estate and effects of such bankrupts, be it enacted, by the authority aforesaid, that, before the creditors shall proceed to the choice of an assignee or assignees of any bankrupt's estate, the major part in value of the said bankrupt's creditors then present shall, if they think fit, direct in what manner, how, and with whom, and where the monies arising by, and to be received from time to time out of the bankrupt's estate, shall be paid in and remain until the same shall be divided amongst all the creditors, as by this act is directed; to which rule and direction every such assignee and assignees, afterwards to be chosen, shall conform, as often as £100 shall be got in and received from such bankrupt's estate, and shall be, and are hereby indemnified for what they shall do in pursuance of such direction of the said creditors as aforesaid." The 4th Sec. of the 49th Geo. III. provides, that an assignee wilfully retaining in his hands, or otherwise employing for his own benefit, any sum of money, part of the estate of the bankrupt, contrary to the aforesaid direction of the 5th Geo. II. shall be charged, in his account with the estate of the

bankrupt, with interest, at the rate of £20 *per centum*, *per annum*. The first question is whether Mr. *Baldwyn* did wilfully retain in his hands, or employ for his own benefit, any part of the estate of the bankrupt, contrary to the directions of the 5th Geo. II. I do not assent to the proposition, that the object of the legislature in passing that act, was merely to prevent delay in declaring a dividend: there was also the further intention, to secure the dividends from loss. The facts of the case are these: the creditors thought fit to direct that the Bank of England should be the place where the estate, as it was collected, should be deposited. The commissioners declared a dividend. There were three assignees, and the intention was, according to the usual custom, to give the creditor's drafts for their dividends upon the Bank, signed by all the assignees. The two other assignees signed the common printed drafts, which were then sent to Mr. *Baldwyn* for his signature. Mr. *Baldwyn* signed them; but, instead of handing them over to the creditors, or permitting the funds to lie in the Bank till called for by the creditors, he himself received the money for which the drafts were given, and applied it to his own use. The provisions of the 5th Geo. II. require that the estate of the bankrupt, which had been paid into the Bank, should there remain until the same should be divided amongst the creditors. The drafts were given to Mr. *Baldwyn* with that object, but Mr. *Baldwyn* defeated that object, and wilfully retained or employed for his own benefit the amount of the dividends, contrary to the directions of the 5th Geo. II. and by so doing, I am of opinion, he became liable to be charged in his accounts, with interest at the rate of £20 *per cent.* *per annum* upon the money retained by him.

1820.

WACKER-
BARTN,
v.
POWELL.

1820.

WACKER-
BARTH,
v.
POWELL.

But it is said that the language of the act of parliament and the covenant of Mr. *Baldwyn*, require that he should account with the commissioners; and as the commissioners are not parties, the account cannot be taken in a suit against his personal representatives. That for which an assignee is bound to account to the commissioners, is a debt due from his estate, and may be each claimed by the actual assignees, in case of his death, in a suit for the administration of his estate. This observation partly answers another objection, that the £20 *per cent.* is in the nature of damages for a tort, and the claim therefore dies with the person. The £20 *per cent.* is made by the statute instead of account and debt.

The next question is, whether the £100 : 11 : 4 is a debt by specialty. That depends upon the obligations of the covenant, and whether Mr. *Baldwyn's* conduct amounts to an infraction of those obligations. The covenant is, "That they the assignees will, " when the money to be received by them, or either " of them, from or out of the bankrupt's estate and " effects, should amount to the sum of £100 or " upwards, pay the same, in the joint names of them, " the said assignees, into the hands of the governor " and company of the Bank of England, for safe " custody, there to remain for the benefit of the creditors of the bankrupt, and subject to the order of " the commissioners." The language of the covenant is borrowed from the act of parliament, and must be construed in the same manner: Mr. *Baldwyn* did not permit the money there to remain for the benefit of the creditors; and as his conduct was in violation of the duties imposed upon him by the act, so also I am of opinion, it was an infraction of the covenant, and

that the £1982 : 11 : 4, must rank as a specialty debt against his assets. I have before stated my opinion, that Mr. *Baldwyn's* estate is liable to pay the £20 *per cent.* under the 49 George the Third; and the only question remaining as to that part of the case is, whether the £20 *per cent.* is to be considered as a specialty or a simple contract debt. It is not a debt which can be connected with his covenant. It is a debt created altogether by the provisions of the statute; and as the statute has not given it the quality of a specialty debt, it cannot be treated as a simple contract debt.

1820.

WACKER-
BARTH,
v.
POWELL.

There is a further difficulty in the case, which has not yet been adverted to in the course of the argument. The money received by Mr. *Baldwyn* at the Bank of England, and ultimately retained by him, was made up of the dividends due to many creditors, and a question therefore arises, whether the £20 *per cent.* shall go to increase the general estate of the bankrupt, or be considered as due to the individual creditors, whose dividends he received. Before the late act of parliament (a), a creditor might obtain payment of a dividend declared, by an action at law against the assignees. The 12th section of that statute takes away the right of action; it is thereby
 “ enacted, That from and after the passing of this act,
 “ no action shall be brought by any creditor or cre-
 “ ditors who have proved, or shall prove, any debt
 “ under any commission of bankrupt, against the as-
 “ signee or assignees of the estate of such bankrupt,
 “ for the amount of any dividend declared by the com-
 “ missioners under such commission; but in all cases

(a) 49 Geo. III. c. 121, s. 12.

1820.

WACKER-
BARTH,
v.
POWELL

" in which the assignee or assignees of any bankrupt
" shall refuse or omit to pay any dividend declared
" under any commission of bankrupt, it shall be
" lawful for the creditor or creditors entitled to the
" same, to petition the Lord Chancellor, Lord Keeper,
" or Lords Commissioners for the custody of the
" Great Seal, for payment thereof:" " and it shall be
" lawful for the Lord Chancellor, Lord Keeper, or
" Lords Commissioners for the custody of the Great
" Seal, on hearing such petition, not only to order the
" payment of such dividend, but also, in all cases in
" which it shall appear to him or them that the justice
" of the case shall require it, to order payment of
" interest for the time that such dividend shall have
" been withheld, and of the costs of the application."

The interest here given upon the dividend must be legal interest, and a creditor therefore can acquire no title to a greater interest, nor has he any claim to legal interest unless he has applied for his dividend, and the assignee has refused or omitted to pay it. I can not know here whether the creditors, entitled to dividends, did or not apply to Mr. *Baldwyn* for payment of them. I must, therefore, direct the payment of the £20 *per cent.* to the assignees, as part of the general estate of the bankrupt, leaving it to the creditors, entitled to dividends, to make such application, with respect to interest, as the circumstances of each case will warrant.

July 17,
1820.

DECREE.—Declare that the sum of £1982 : 11 : 4 is a debt, by specialty, upon the estate of the said testator, and payable as such out of the assets of the said testator, by virtue of the covenants in the pleadings mentioned, and let so much of the £11,301 : 2 : 4 Bank £3 *per cent.* reduced annuities, standing in the

name of the Accountant General, in trust in these causes, "The account of monies arising by the sale " of the real estates of *Richard Baldwin*," as, according to the market price the said annuity bear on this day, is of the value of the said sum of £1982 : 11 : 4, be carried over in the name and with the privity of the said Accountant General, in trust in these causes, "The account of unpaid creditors of the " said *John Cox* and *Frederick Heisch*;" and the said Accountant General is to declare the trust thereof accordingly subject to the further order of this court, and interest to be laid out in the usual manner: and let all or any of the unpaid creditors of the said *John Cox* and *Frederick Heisch*, whose dividends are comprized in the said sum of £1982 : 11 : 4, or any other person, or persons who shall be entitled to the same, be at liberty to apply to this court, as they shall be advised, and refer it back to the Master to compute interest upon the said sum of £1982 : 11 : 4 after the rate of 20 *per cent. per annum*, from the 29th day of June 1809, the date of passing of the 49 Geo. III, c. 121, intituled, "An act to alter and amend the laws relating to bankrupts, to the twelfth day of June 1812, the day of the decease of the said testator; and declare, that the amount of such interest is a debt by simple contract, and payable as such out of the assets of the said testator; and declare, that the plaintiffs, *John Crosthwaite* and *Thomas Lowndes*, as assignees as aforesaid, are entitled to the amount of such interest, for the benefit of themselves and all other the creditors of the said *John Cox* and *Frederick Heisch*, rateably and in proportion to their several debts.

1820.

WACKER-
BARTH,
v.
POWELL.

1819.

Ex parte

KIRBY,

Ex parte

TODD.

In the Matter

of

MOORE,

TENNANT,

and FOSTER.

his clerk to Kirby with a bill of exchange for the sum of £300, bearing date the 30th day of March, 1816, purporting to be drawn by Messrs. *Stabler and Company*, upon and accepted by Messrs. *Marshall and Company*, payable three months after the date thereof to *Moore, Tennant, and Company*, and indorsed by them; and requested Kirby to place £100, part of the said bill, to the credit of the goods sold, and then due; and to send him a bill for £200, the balance of the said bill for £300. Accordingly Kirby sent to *James Tennant* a banker's draft for £200, which was afterwards duly paid, and gave him credit in account for the bill for £300, and debited him with the bill for £200. On the 6th day of July, the bill for £300 became due, but was dishonored and returned to Kirby for non-payment.

At a meeting of the commissioners Kirby was permitted to prove a debt of £300 against the joint estate of *Moore, Tennant, and Foster* as indorsers of the bill for £300; and on the following day he also proved a debt of £895:3:8, against the separate estate of *James Tennant*, being the balance (after deducting for two parcels of canvas furnished to him by *James Tennant*) of his account, in respect of the sale of the goods and the cash received by the banker's draft for the sum of £200, given by him to *James Tennant*.

It appeared by the affidavit of *James Tennant's* clerk, that on the bill for £300 being presented by him to Kirby, he consented to discount the same, on being allowed to retain thereout the sum of £100 on account of the debt due and owing to him by *James Tennant*, on his separate account; but the bill being

drawn in favor of *Moore, Tennant, and Foster*, and being indorsed by the said *Jonathan Foster* in the name or firm of *Moore, Tennant, and Co. Kirby* objected to such indorsement, as not corresponding exactly with the description of the payees, and thereupon *Jonathan Foster* altered such indorsement to that of *Moore, Tennant, and Foster*; when *Kirby* gave the deponent his draft for £200, being the difference, retaining the said sum of £100, which draft was afterwards delivered by the deponent to *James Tennant*.

1819.

Ex parte
KIRBY,
Ex parte
TODD.
In the Matter
of
MOORE,
TENNANT,
and FOSTER

The second petition was that of the assignees; and it prayed that *Kirby* might forthwith elect between the joint and separate estates of *Moore, Tennant, and Foster*, and *James Tennant*, so far as respected the proof of the said sum of £300, and the dividends thereon, and that such proof might be expunged and reduced accordingly; and in case the petitioner should elect to prove the whole of the said sum of £895 : 3 : 8, against the separate estate of the said *James Tennant*, then that he might refund, or account for the dividend already received by him, on the amount of the bill of exchange for £300, out of the said joint estate. The petitions came on to be heard together before the Vice Chancellor, on the 19th March, 1818, when his Honor was pleased to order that the petition of *Kirby* should be dismissed, and that the proof made upon the separate estate of the said *James Tennant*, should be reduced to the sum of £595 : 3 : 8, and should stand as a proof, under the said commission, for such sum only. From this order *Kirby* appealed, stating he conceived that he was aggrieved by the order; inasmuch as, if he were not entitled to prove against both the joint and separate estates of the firm of *Moore, Tennant, and Foster*, and *James Tennant* in

1819.
 ———
Ex parte
 KIRBY,
Ex parte
 TOND.
 In the Matter
 of
 MOORE,
 TENNANT,
 and FOSTER.

respect of the sum of £300, either the bill ought to have been sold, and the petitioner permitted to prove for the residue of the £300 against the estate of *James Tennant*, or he ought to have been permitted, according to the prayer of the petition of the assignees, to elect against which estate he would make his proof; and in that case he would have elected to prove against the separate estate of *James Tennant*, and would have refunded the dividend received by him from the joint estate. That with respect to the sum of £100, the same was a separate debt due to him from *James Tennant*, which never was satisfied, the said bill for £300 not having been accepted by the petitioner as payment, and never, in fact, having been paid.

The LORD CHANCELLOR.

The circumstances of this case are very special. It appears that *Tennant* carried on a trade separate and distinct from that in which he was engaged with *Moore* and *Foster*, and in the course of his dealings in that separate trade, he purchased goods from *Kirby*, the petitioner, to the amount of £700, upon a credit of eight and nine months. On the 2d of April, 1816, £100 being then due, *Kirby* applied to *Tennant* to have that sum paid, and upon that application *Tennant* sent his clerk to *Kirby* with a bill of exchange for £300, drawn in favor of *Moore, Tennant, and Foster*, payable three months after date, and indorsed by *Moore, Tennant, and Foster*, and not by *Tennant and Company*. You will observe, this bill is dated the 30th March, 1816, and therefore, when this transaction took place, it wanted upwards of two months of becoming due. *Kirby* took this bill, and gave *Tennant* credit in account for the £100, and sent him a banker's

check for the remaining £200, which I am to suppose was paid. It is not a very common thing for a man to give £300 for a bill of equal amount, which is not to become due till more than two months after the transaction, as he thereby loses the interest of his money. It is therefore impossible, looking at the dates, to consider this as a case of discount. It appears that the bill for £300 was afterwards dishonored, and *Moore, Tennant, and Foster* having become bankrupts, *Kirby* attended before the commissioners, who permitted him to prove the £300 both against the estate of *Moore, Tennant, and Foster*, and the separate estate of *Tennant*. It is quite clear, he could not prove on the bill against the separate estate. The assignees think it is a case of election, and that there ought not to be a double proof. I do not see how it can be considered as a case of election. The Vice Chancellor was of opinion, that the proof of the £300 against the separate estate ought to be expunged: the order states, that the petition of *Kirby* should be dismissed, and that the proof made upon the separate estate of *Tennant*, should be reduced to the sum of £595:3:8, *Kirby* having proved for £895:3:8. Upon the petition of rehearing, the petitioner takes new ground: he insists, that he is either entitled to prove against both the estates; or otherwise, that he ought to be permitted to elect against which of them he will make his proof. The question is, whether, upon the exchange of paper, there was a relinquishment of the relation of debtor and creditor as to the £100, and whether that transaction constituted a new debt from *Tennant* to *Kirby*. Now, if I hold a bill of exchange, and a man gives me money for it, without taking my indorsement, and the bill turns out to be worth nothing, he has no demand against me.

1819.

Ex parte
KIRBY,
Ex parte
TODD.

In the Matter
of
MOORE,
TENNANT,
and *FOSTER.*

1819.

Ex parte
KIRBY,
Ex parte
TODD.

In the Matter
of
MOORE,
TENNANT,
and FOSTER.

But if there were an antecedent debt due from me to him, the demand against me is not discharged by his taking the bill in payment. If this transaction had been nothing more than a payment of the £100, which was due, by a bill of equal amount, the proof ought to have been made; but the circumstances are much more complicated: the bill is for £300, and is dated the 30th of March, and would not become due till July; as to the £100, there was an antecedent debt; as to the remainder, there was a payment in money; and though the bill wanted nearly three months of becoming due, no deduction was made on that account. It therefore becomes impossible to say, it was a case of discount. But if it be not discount, in what respect is Kirby to be considered as retaining his old demand, and obtaining a new one. If he chose to give a consideration to Tennant alone for a demand on Tennant, Moore, and Foster, that did not create a debt from Tennant in his individual character. Then he represents himself to have taken the bill without the indorsement of Tennant, by mistake; but it appears by the affidavit of Tennant's clerk, that he observed it so accurately as to desire to have it altered, for the purpose of making the indorsement correspond with the firm of the payees, as described in the bill. The question is, whether the £200 shall draw after it the £100, or the £100 the £200, for the transaction must be considered either to be an exchange of paper for the whole, or debt for the whole. I think it was an exchange of paper, and, therefore, that the opinion of the Vice Chancellor is right.

Mr. Cullen and Mr. Pemberton for the appellant.

Mr. Hart contra.

Ex parte GLENDINNING.—In the Matter of
RENTON.

LINC. INN,
Nov. 3,
1819.

THIS was an appeal from the decision of the late Vice Chancellor, who had ordered the petitioner's proof for £350 to be expunged. The petitioner was the indorsee and holder of a bill of exchange for £350, dated February 27, 1815, and accepted by the bankrupt for the accommodation of the drawer. The petitioner, in his examination before the commissioners, deposed, that some time previous to his receiving the said bill for £350 from one *Rowe*, the drawer, *Rowe* informed the petitioner that the bankrupt had promised to lend him £350 for three years, but was not then able conveniently to do so, but had offered to lend him his acceptance for £350, at six months; and asked the petitioner whether he would give the bankrupt as much cash as he might want out of it, and put the rest to his account? To which the petitioner agreed, whereupon an arrangement took place between the petitioner and the drawer, and the drawer indorsed the bill to the petitioner. The petitioner further deposed, that when the bill became due, it was dishonoured; and that on the 18th of November, 1815, he proved it under the bankrupt's commission, and that previously to his proof he had arrested *Rowe*, as the drawer and indorser of the bill; and that he had been informed by his attorney, and believed, that a *cognovit* was taken in the action from *Rowe*; and that afterwards the petitioner had been applied to by *Rowe* to come in as a creditor under an assignment of his effects, and which the petitioner had accordingly executed in the month of October then last. The peti-

If a creditor execute a deed of compromise with the principal debtor, he thereby discharges the surety.

Not so, if it be stipulated in the deed of composition, that the remedies against the sureties shall be reserved.

Parol evidence of the understanding of the parties to the deed, that the remedies against the sureties should be reserved, cannot be admitted.

1819.
Ex parte
GLENDIN-
NING.
 In the Matter
 of
 RENTON.

tioner admitted that he had not previously obtained the consent of the bankrupt or of the assignees for that purpose.

It also appeared, that the petitioner had given the indulgence to the drawer upon an understanding that he reserved the full benefit of his proof against the bankrupt's estate, but such benefit was not reserved by the trust deed.

Mr. *Hart* and Mr. *Lovat*, in support of the appeal, cited *Kerrison v. Cooke* (a), and *Fentum v. Pocock* (b); and also insisted that the petitioner had in fact reserved his remedy against the bankrupt's estate.

Mr. *Heald*, *contra*, relied upon *Laxton v. Peat* (c), and his Lordship's judgment in *English v. Darley* (d).

THE LORD CHANCELLOR.

I perfectly remember when it was for the first time laid down in the courts of law that where there was an acceptor without effects, notice of the dishonor of the bill need not be given to the drawer (e). This rule being once established, there naturally sprung out of it a new doctrine as to the respective liabilities of the drawer and acceptor in cases where the indorsee had notice that the acceptance was given merely for the purpose of accommodating the drawer. And the

(a) 3 Camp. 362.

(b) 5 Taunt. 192. 1 Marsh. 14.

(c) 2 Camp. 185.

(d) 2 Bos. and Pull. 61.

(e) The case of the Dutch bill mentioned by Buller, J. in *Bickerdike v. Boleman*, 1 T. R. 410, appears to have been the first in which that doctrine was acted upon.

cases go the full length of determining that as between the drawer and acceptor and indorsee, with notice, the drawer should be considered as the principal; and if the indorsee give time to the drawer, that shall discharge the acceptor. These cases were shaken by the authority of Sir James Mansfield, which in this and in every other court is entitled to be received with the greatest respect. But I observe in the printed report of the case, that not one of the numerous decisions of this court were called to that judge's attention. Now the practice is quite familiar in this court, where the indorsee, with notice of the accommodation transaction, has recovered upon the acceptance, to allow the acceptor to prove for the amount under the drawer's commission. I think this equity naturally grew out of the doctrine of not requiring notice to be given when the acceptor had no effects. Although no man more than myself laments the introduction of that doctrine, yet I cannot overturn what has been for so many years acknowledged and acted upon as part of the general mercantile law of the country. If a man by deed agree to give his principal debtor time, and in the deed expressly stipulate for the reservation of all his remedies against other persons, they shall still remain liable, notwithstanding the arrangement between their principal and the creditor; but if the creditor do not reserve his remedies, the deed will operate as a discharge to the sureties; which rule I conceive is founded upon this maxim, that it is against conscience and equity that you should put persons in a situation in which they have not contracted to be placed. It may be said, the surety is not injured by the creditor's arrangement with the debtor, and in many cases the compromise may happen to be extremely advantageous to him. But this is no answer to a surety who stands

1819.

Ex parte
GLENDIN-
NING.
In the Matter
of
RENTON.

1879.
Ex parte
 GLENDIN-
 NING.
 In the Matter
 of
 RENTON.

upon his contract. Besides, it is evident, creditors would not pursue their actions with the same promptness and activity, if they were not urged on by the consideration that any laches on their part would discharge the sureties. Ever since Mr. *Richard Burke's* case, the law has been clearly settled, and it is now perfectly understood, that unless the creditor reserve his remedies; he discharges the surety by compounding with the principal, and the reservation must be upon the face of the instrument by which the parties make the compromise; for evidence cannot be admitted to explain or vary the effect of the instrument. I therefore feel myself bound to declare, in conformity to the decisions of my predecessors, that the trust deed operated as a discharge to the acceptor.

Petition of appeal dismissed with costs.

MIC. TERM,
 1819.

Ex parte HAWKINS.—In the Matter of
 HOLMES.

Where, through the error of the commissioners, the great body of the creditors were prevented from proving their debts, and voting in the choice of assignees, a new choice was directed.

IN this case, three or four creditors, whose debts amounted to £49 in the whole, had proved. The commissioners had refused the proofs of other creditors, to the amount of £1100; assignees were then chosen by the creditors who had proved; and afterwards the proofs of the other creditors were allowed, who under these circumstances presented this petition for a new choice of assignees.

The LORD CHANCELLOR.

I have always understood the rule to be, if the com-

missioners, in the fair exercise of their judgment, have excluded two or three creditors, that is no reason why there should be a new choice of assignees; but that must not be carried to the extent of saying, that if there be fifty creditors, and forty-nine were excluded through the misjudgment of the commissioners, the choice of the one creditor shall stand. In this case, where the great body of the creditors has been excluded, I must permit them to have the opportunity of voting in the choice of the assignees.

1819.

Ex parte
HAWKINS.
In the Matter
of
HOLMES.

Let there be a new choice of assignees.

Mr. Hart was for the petition.

Mr. Cullen opposed it.

Ex parte MOORE.—In the matter of MOORE. MIC. TERM.
1819.

COATES had issued a writ against Moore the bankrupt; but before the arrest, he proved the debt for which the action was brought under his commission. The bankrupt afterwards was arrested, and surrendered himself in discharge of his bail, and whilst he lay in the King's Bench prison, several detainers were lodged against him, some of them by persons who had proved their debts under the commission, and others by those who had not. The bankrupt presented this petition to be discharged from the arrest and the subsequent detainers, at the cost of Coates and the detaining creditors, who had proved under the commission.

A creditor issued a writ against the bankrupt, and then proved his debt under the commission. The bankrupt was afterwards arrested, and several detainers were lodged against him. Held that the bankrupt should be discharged from the arrest and all the detainers, the arresting creditor to pay all the costs.

1819.
 ———
Ex parte
 Moore.
 In the Matter
 of
 Moore.

For the petitioner it was contended, that the 49 Geo. III. c. 121. s. 14. put a creditor who had proved a debt, in a situation similar to that of a petitioning creditor, previous to the statute, who was not permitted to proceed at law against the bankrupt; but if he did, and arrested the bankrupt, such arrest and all subsequent detainers were illegal, and the practice was to discharge the bankrupt from the arrest and detainer, as was done by Lord *Hardwicke* in *ex parte Wilson* (a).

The detaining creditors who had not proved, relied upon *Barclay v. Faber* (b), lately decided by the court of King's Bench.

The LORD CHANCELLOR said it did not appear by the printed report of the case before the Court of King's Bench, that Lord *Hardwicke's* decision had been cited to them; and that he would converse with the Lord Chief Justice before he decided upon the petition.

10th November.

The LORD CHANCELLOR.

I mentioned this case to the Lord Chief Justice. He admits that their decision cannot be reconciled with that of Lord *Hardwicke*. The statute (c) having put all creditors, proving under the bankrupt's commission, in the same situation with respect to proceedings at law against the bankrupt, as the petitioning

(a) 1 Atk. 152.

(b) 2 Barn. and Ald. 743.

(c) 49 Geo. III. c. 121. s. 14.

creditor was before the statute, I am of opinion, under the authority of *ex parte Wilson* (a), that the bankrupt must be discharged against all subsequent detainers, and that the costs must be paid by the arresting creditor, who has been the occasion of all the expense incurred.

1819.

Ex parte
MOORE.
In the Matter
of
MOORE.

Mr. *Fonblanque*, Mr. *Richards*, Mr. *Parker*, Mr. *Montagu*, and Mr. *Rose*, appeared for the several parties.

In the Matter of —

MIC. TERM.
1819.

MR. TWISS moved, in a country commission, that an auxiliary commission might issue to take the examination of the bankrupt in London, in order to avoid the expense and inconvenience of sending him into the country to be examined.

Application for
an auxiliary
commission to
examine a bank-
rupt, refused.

The LORD CHANCELLOR.

We have never granted auxiliary commissions for the purpose of examining the bankrupt.

Application refused.

(a) 1 Atk. 152.

MIC. TERM, *Ex parte* HODGES.—In the matter of MOORE.
1819.

Upon a petition by a creditor for his dividend, the assignees can only resist the payment upon such grounds as they could have defended an action previous to the 49 Geo. III. c. 121.

THIS was a petition by a creditor who had proved under the commission for the payment of a dividend.

Affidavits were filed in opposition to the petition, by which it appeared that the entire management of the bankrupt's estate had been committed to one of the assignees by the others, who had not taken any active part in the administration of the estate. The managing assignee having become bankrupt, it was insisted, under the circumstances of the case, which were mentioned in the affidavits, that the co-assignees were in equity discharged from the payment of the dividends deposited in their hands.

It was objected, that these affidavits could not be read in opposition to the petition.

The LORD CHANCELLOR.

If, previous to the statute (a), an action had been brought for the recovery of a dividend, I conceive the court of law would not look further than the order of dividend. The remedy by petition being now substituted in lieu of an action, the payment can only be resisted by the assignees on the same grounds as they would have been permitted to dispute the demand at law. If the solvent assignees think they have any equity to resist the payment of the dividend, they must present a petition for that purpose; and if they are advised to proceed in that way, I will delay the order for the payment of the dividend.

(a) 49 Geo. III. c. 121. s. 12.

The assignees determined to present a petition.

1819.

Mr. *Wingfield* and Mr. *Shadwell* for the petition.

Ex parte
Hougen.
In the Matter
of
MOORE.

Mr. *Horne*, Mr. *Cullen*, and Mr. *Rose*, for the assignees.

Ex parte PEARSE and PROTHERO.—In the matter of PRICE.

LINC. INN,
Jan. 18,
1820.

PRICE being indebted to *Pearse* in the sum of £427:11:11, *Pearse* commenced an action against him in the King's Bench; whereupon it was agreed, that *Price* should give *Pearse* a *cognovit* for £420, *Pearse* relinquishing the £7:11:11, and that *Price* should secure the re-payment of the £420 by the mortgage of a freehold house in Abergavenny, and that such mortgage should extend to all sums to be advanced, not exceeding £500. All the title deeds of the estate were afterwards sent to *Pearse*, to enable him to prepare a mortgage, except the immediate conveyance to the bankrupt in fee. The bankrupt being indebted to *Prothero* in the sum of £215:10, in May, 1816, deposited with him the immediate conveyance of the premises as a security, and promised to send him the other title deeds.

The bankrupt agreed with A. to execute a mortgage of certain premises for the security of a debt, and he sent, in order that A. might prepare the mortgage, all the title deeds, except the immediate conveyance to himself. The bankrupt, being also indebted to B. took that conveyance, and deposited it with him as a security for his debt, at the same time promising to send him the remainder of the title deeds. Held, that A. and B. had not, either separately or collectively, an equitable mortgage upon the premises.

Pearse and *Prothero* joined in the petition, and the prayer was to take an account of petitioners' debts, and for a sale of the premises to be applied in discharge of them, and to prove for the residue.

1820.

Ex parte
PEARSE and
PROTHERO.
 In the Matter
 of
PRICE.

When this case came on before the Lord Chancellor, he said, it was one of great difficulty. He said, the misfortune of the doctrine in the case of *Russell v. Russell (a)* was, that it went upon the idea, that the deposit must necessarily have been for the purpose of creating a mortgage of the estate; whereas he had taken the liberty to argue, that the deposit of the deeds only gave a power over the estate by the torment the depository could inflict upon the owner, whenever he wanted to sell the estate.

See how the case stands. The owner of the estate deposits all the deeds, except the actual conveyance to himself. Might it not be argued, there was no fraud on his part, and that he only intended to pledge the deeds he actually deposited. Afterwards he borrows a little more money of another person, and deposits, as a security, the remainder of the deeds. Then the question is, whether these two creditors are to be considered as equitable mortgagees by force of their respective deposits; and if they are, which of them is to have the preference. Suppose the deeds had been divided amongst twenty different creditors, would each of them have been equitable mortgagees, or could they altogether have formed one mortgagee.

The case was again argued by Mr. *Horne* and Mr. *Heald* for the petitioners, and by Mr. *Montagu* and Mr. *Rose* for the assignees.

The cases cited were, *Russell v. Russell (a)*, *ex parte Coming (b)*, *ex parte Haigh (c)*, *ex parte Finden (d)*,

(a) 1 Bro. C. C. 269. (b) 9 Ves. 115. (c) 11 Ves. 403.
 (d) 11 Ves. 404.

Norris v. Wilkinson (e), *ex parte Mountfort* (f), 1820.
ex parte Combe (g), *ex parte Whitbread* (h), *ex parte*
Warner (i), *ex parte Hooper* (k), *Head v. Egerton* (l). *Ex parte*
PEARSE and
PROTHERO.

In the Matter
of
PRICE.

The LORD CHANCELLOR.

I am of opinion, after a great deal of consideration, that neither the one nor the other of these gentlemen have an equitable mortgage. The way in which they have been driven to frame the petition is, in itself, an argument of no little weight against them.

How far the assignees can get the deeds from them, is another matter. It is enough to say, that it was not the intention of the one, that he should have a mortgage till an actual one was executed to him, and that the other was not to have an equitable mortgage till he got possession of the whole of the deeds.

Ex parte EMERY.—In the matter of *EMERY.* HIL. TERM.
1820.

THE bankrupt was, when the commission issued, in prison for a debt due to the petitioning creditor, and a subsequent detainer had also been lodged against him. Under these circumstances, he was prevented from surrendering himself before the commissioners at the last meeting. He now applied to be allowed to surrender, and to be carried before the commissioners, at the expense of his estate.

A bankrupt in prison for debt, is entitled to be carried before the commissioners, that he may surrender himself at the expense of the estate, notwithstanding he might, upon a summary application, have obtained his discharge.

- (e) 12 Ves. 192. (f) 14 Ves. 606. (g) 17 Ves. 369.
(h) 1 Rose B. C. 299. (i) 1 Rose B. C. 286.
(k) 2 Rose B. C. 328. (l) 3 P. Wms. 279.

1820.

Mr. Horne and Mr. Buck for the petitioner.

Ex parte
EMERY.
In the Matter
of
EMERY.

Mr. *Beames*, for the assignee, did not object to the bankrupt being allowed to surrender, but he objected, on two grounds, to the costs of the meetings of the commissioners, and of the bankrupt's journey into the country, being cast on the estate. First, that as he was in execution at the suit of the petitioning creditor, the proof of his debt, under the commission, was, by the late act (*a*), an election, enabling the bankrupt, on a summary application, to obtain his discharge out of custody; and that, as the bankrupt was served with notice of the adjudication on the 2d October, before any detainer was lodged, he might have obtained his discharge and surrendered himself, if he had thought fit. Secondly, the estate was so completely insolvent, that the expenses of the commission, up to the choice of assignees, had not been, and never would be paid.

The LORD CHANCELLOR observing, that, in the eye of the law, the bankrupt had no property (*b*), and that the assignee had adopted the commission, made the order as prayed.

(*a*) 49 Geo. III. c. 121. s. 14.

(*b*) See *ex parte Graham*, 2 Bro. C. C. 48.

Norris v. Wilkinson (e), *ex parte Mountfort* (f), 1820.
ex parte Combe (g), *ex parte Whitbread* (h), *ex parte*
Warner (i), *ex parte Hooper* (k), *Head v. Egerton* (l).

Ex parte
 PEARSE and
 PROTHERO.
 In the Matter
 of
 PRICE.

The LORD CHANCELLOR.

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 (h) 1 Rose B. C. 299. (i) 1 Rose B. C. 286.
 (k) 2 Rose B. C. 328. (l) 3 P. Wms. 279.

1819. the commission. If he let these pass, and the next morning, before the Master's office is open, gets his commission sealed, it will take priority, according to the practice. The reason of the practice is, that the order, being to prompt expedition, is to be construed so as to insure it. If you see that expedition has been used, it would be bad to take the seal off the first commission, to make way for another that may not be proceeded in so quickly.

In the Matter
of
GRAHAM.

He then said, he would inquire as to the practice.

March 17. The LORD CHANCELLOR said he had inquired, and found the uniform practice had been, that if a creditor, having struck a docket, made an application for a commission on the fifth day previous to the second docket being struck, his application has the preference; and though it would be difficult to reconcile that with the terms of the order, yet he should be averse to alter it. If it were not so, the first commission might be completed, except the sealing, and the second docket would have preference over it, even if it had gone so far as that. He supposed this inconvenience had led to the practice. According to the words of the order, it was not enough that the commission should have been bespoken, it must have issued, and if not under seal, it would not have issued.

The motion refused.

Ex parte STONEHOUSE.—In the matter of
MOORE.

LINC. INN,
April 18,
1820.

AN assignee in bankruptcy, who had received effects, became bankrupt. A question arose in this petition, whether a creditor under the first commission, who had proved his debt after the bankruptcy of the assignee, was a creditor entitled to prove under his commission.

If an assignee, who has received effects, become bankrupt, a creditor, under the commission in which he was assignee, but who proved his debt after the bankruptcy of the assignee, is not entitled to any proof under the assignee's commission.

The LORD CHANCELLOR.

If an assignee become a bankrupt, that does not put an end to the trust, and what he has received may be proved under his commission. But if a proof in the original bankruptcy be not made till after the bankruptcy of the assignee, the demand of a creditor so proving would not be barred by the bankruptcy and certificate of the assignee, and cannot be proved under his commission.

Ex parte COSSENS.—In the matter of WORRALL. LINC. INN,
August 4,
1820.

THE petition stated, that, previous to the commission, *Samuel Worrall*, the bankrupt, held the office of town clerk of the city of Bristol, but either in contemplation of the commission being issued, or shortly after effects, although such information may tend to shew that he has committed a criminal act; but if the question put to him be, whether or not he has done an act clearly of a criminal nature, he may refuse to answer it; so, where a petition prayed that the creditors might be at liberty to examine the bankrupt whether he, or any persons in trust for him, or for his benefit have received, or are to receive any sum of money, or other valuable consideration for his having resigned, or as an inducement to resign the office of town clerk of the city of Bristol, it was dismissed. A bankrupt cannot refuse to discover the particulars relating to his estate and effects.

1820. it was issued, he resigned such office, and *Ebenezer Ludlow* was appointed town clerk in his place. That the petitioners had duly proved their debts. That the 9th of October last past was the day appointed, pursuant to notice in the London Gazette, for the final examination of the bankrupt. The petitioner, *Thomas Williams*, attended the meeting, at which *Ebenezer Ludlow*, *Jeremiah Osborne*, and *Edward Wimwood*, were the acting commissioners, of which *Ebenezer Ludlow* was the quorum: that the petitioner, *Thomas Williams*, having been informed that the bankrupt had resigned the office of town clerk, in consequence of having received, or of some agreement that he should receive, a pecuniary consideration for so doing, the petitioner, *Thomas Williams*, stated to the said commissioners then present, that he wished to question the bankrupt as to whether he had given, or was going to give, any account of such consideration; that upon the said petitioner informing the said commissioners of such his intention, the said *Ebenezer Ludlow* said, he should object to any such question being put, and upon the said petitioner's stating that he should employ some professional gentleman, who would probably put the question in a more legal way than he could, the said *Ebenezer Ludlow* told the said petitioner that, let who would attend, he the said *Ebenezer Ludlow* should oppose any such question being asked. That, notwithstanding this refusal on the part of the said *Ebenezer Ludlow*, the quorum commissioner, to allow the inquiry to be made, the petitioner *Thomas Williams*, through the medium of *Charles Houlder Walker*, of the city of Bristol, gentleman, his solicitor, employed *Thomas Stocking*, esq. barrister at law, to examine the bankrupt touching the premises. That the said Mr. *Stocking* arrived before the examination of the said bankrupt had been commenced, and upon

Ex parte
CosSENS.
In the Matter
of
Worrall.

his arrival the said *Ebenezer Ludlow* inquired of him the nature of the questions he intended to put to the said bankrupt; when the said *Mr. Stocking* replied that, according to his instructions, they related to the retirement of the bankrupt from the town clerkship of the city of Bristol: whereupon the said *Ebenezer Ludlow* rejoined, in effect, that he had already declared that that subject was not one that should be discussed, and that he should object to its being gone into; that he had not been surprised at *Mr. Williams*, the shoemaker, meaning the petitioner *Thomas Williams*, proposing such a question, but that he should be much surprised to hear it come from a professional man: and the said *Ebenezer Ludlow* appeared to the petitioner, *Thomas Williams*, to do and say all he could to deter or influence the said *Thomas Stocking* from persisting in putting any question upon the said subject. That the said *Thomas Stocking*, notwithstanding, insisted upon his right to do so, and proceeded to put the following question to the said bankrupt, that is to say: "Did you, previously to the date of the commission of bankrupt issued against you, hold the situation of town clerk of the city of Bristol;" to which the bankrupt answered, "I did." That the petitioner's counsel then asked, "Do you hold that situation now;" to which the bankrupt answered, "I do not." That upon the said bankrupt being questioned as to how long it was since he had ceased to hold that situation, he answered, "I do not know exactly, I sent my resignation in since the date of this commission." That the petitioner's counsel then put the following question to the said bankrupt, "Have you, or has or have any person or persons in trust for you, or for your use or benefit, or for the use or benefit of your wife and children, or any of them, received,

1820.

Ex parte
COSSENS.
In the Matter
of
WORRALL.

1820.

Ex parte
COSHENS.In the Matter
of

WORRALL.

“ or are you or any person or persons in trust for you,

“ or for your benefit, or for the benefit of your wife

“ and children, or any of them, to receive from any

“ person or persons, and whom, any and what sum or

“ sums of money, annuity, compensation, or allow-

“ ance, as a consideration or inducement for resigning

“ the office of town clerk of the city of Bristol.”

That upon the last question being put to the said bankrupt, the said *Ebenezer Ludlow*, the successor of the said bankrupt in the office of town clerk, and the quorum commissioner as aforesaid, immediately interfered and said, that he did not consider it a proper question, and that the bankrupt was not bound to answer it; that he the said *Ebenezer Ludlow* had no wish to prevent investigation, but there was a great difference between that and gratifying merely idle curiosity. That it was at the same time admitted by the solicitor to the commission, and the accountant who had prepared the accounts to be exhibited by the bankrupt on his last examination, and in the presence and hearing of the said acting commissioners, and also of the said bankrupt, that no account whatever was given of any consideration received, or to be received by the said bankrupt, as an inducement to resign, or for having resigned the office of town clerk. That, for a considerable time, the said *Ebenezer Ludlow* prevented this question from being submitted to the said bankrupt, and argued at great length against its propriety, but upon the petitioner's counsel pressing the question, and saying he should require of the said bankrupt either to answer the same, or that he would refuse to give such answer, the said *Ebenezer Ludlow* at last said, Mr. *Worrall* might answer it if he pleased, but added, that he the said *Ebenezer Ludlow* did not consider the said bankrupt

was bound to answer it. That upon the question being then read, the said bankrupt answered "In consequence of what had fallen from the quorum commissioner, I decline answering the question:" which answer was taken down. That after such answer had been so taken down, the said *Ebenezer Ludlow* observed, it would be better for him the said bankrupt, not to ground his answer upon what he the said *Ebenezer Ludlow* had said, but give his own answer; upon which the said bankrupt said, "I decline to answer such question:" and thereupon the last mentioned refusal was substituted in the room or place of the former one, and was, as the petitioner believes, regularly signed by the said bankrupt. That upon the said bankrupt's refusing to answer the said question, the petitioner's counsel moved, that the said bankrupt might be committed. That the said *Ebenezer Ludlow* observed, that if the bankrupt had received any money, there would be a sufficient answer to the question, when he put his watch and all the money he had upon the table, and swore that he had given up every thing, as it was well known that if he concealed property to the amount of £20 it would be a capital offence. That the petitioner's counsel contended, that would not be an answer to the whole of his question, and that he must still move for the committal of the said bankrupt, for not answering the question he had put. That the said *Ebenezer Ludlow* said, the junior commissioner would give his opinion on the point first, whereupon the said *Edward Wimwood* said, he thought nothing had been advanced which would warrant the commissioners in committing the said bankrupt; and the said *Jeremiah Osborne* expressed himself to the same effect. That the said *Ebenezer Ludlow* said, as his brother commissioners had expressed their sentiments, which entirely

1820.

Ex parte
Cossens.
In the Matter
of
Worrall.

1820.

Ex parte
COSSENS.
In the Matter
of
WORRELL.

accorded with his own, in so few words, he should, after what he had already said, content himself with adding that he saw no ground for committing the bankrupt, and would not give way to his feelings, which in the first instance he felt inclined to have done, and to have made some observations upon what had passed. That the petitioners had been informed, and in their consciences believed, that the said bankrupt, or some person or persons in trust for him, or for his benefit, is or are to receive some sum or sums of money, or other valuable consideration, which was or were agreed to be paid to or on account of the bankrupt, to induce or prevail upon him to resign the office of town clerk; and the petitioners had, since the said last examination of the said bankrupt, been informed of the names of certain persons whom the petitioners had every reason to believe had full knowledge of the facts relating to the transaction, and from whose lips, independently of the said bankrupt, they could substantiate the same; and the petitioners humbly conceived that such sum or sums of money, or other valuable consideration, ought to be accounted for by the said bankrupt under the said commission.

The petition prayed that his Lordship would be pleased to direct that the petitioners, or any other of the creditors of the said bankrupt, might be at liberty to examine the said bankrupt fully, touching his estate and effects, and all matters and things relating thereto, and particularly as to whether he, or any person or persons in trust for him or for his benefit, have received, or is or are to receive, any sum or sums of money, or other valuable consideration, for having resigned, or as an inducement to resign the office of town clerk of the city of Bristol; and that, for the purpose of such an examination, a

meeting of the commissioners named and authorized in and by the said commission of bankrupt against the said *Samuel Worrall* and *Andrew Pope*, and the said *Samuel Worrall*, *Andrew Pope*, and *John Edmonds* respectively, or the major part of them, might be held; and that, if it should appear to his lordship that the said *Ebenezer Ludlow* is interested in the premises, that his lordship would be pleased to direct that he might not act any further as a commissioner under the said commissions, or either of them. And that his Lordship would be pleased to direct that the costs of and attending the future examinations of the said bankrupt, touching the matter in question, as well those which might be incurred by the petitioners as otherwise, and also the costs of and incident to this application, might be paid by such person or persons, or out of such fund or funds, as his Lordship should think just.

1820.

Ex parte
COBSENS.
In the Matter
of
WORRALL.

It appeared by the affidavit of *Samuel Worrall*, that he held the office of town clerk of the city of Bristol for thirty years and upwards, and that in that capacity he sat as chairman at the court of Quarter Sessions held for the city and county of Bristol, and attended at the corporate meetings of the mayor, aldermen, and common council of the said city. That the office of town clerk is specified in the charters of the city of Bristol, and that the requisite qualification for it is, that the party be a barrister of three years standing, and that the appointment of the person to fill the said office is vested in the mayor, aldermen, and common council of the said city of Bristol in common council assembled; which said mayor, aldermen, and common council consist of forty-three persons. That on the bankruptcy of himself and his

1820.

Ex parte
COWENS.
In the Matter
of
WORRALL.

partner there was an extensive circulation of their notes, principally for small sums, in the hands of the lower classes, and feeling that it would be inconsistent with the altered situation of his affairs to hold the office of town clerk, the deponent was induced by those motives, and the high feeling of respect he had for the corporation of Bristol, as well as for the honor of the official situation of town clerk, to resign the same. That he had not any interest or means of procuring the appointment of his successor, and that he did not, directly or indirectly, attempt to use, nor did he use any solicitation or endeavour with any member of the corporation, or with any person or persons whatsoever, to procure such appointment. That he had not, at the time of his last examination under the said commission of bankrupt, and hath not since, neither hath or have any other person or persons (to deponent's knowledge or belief) in trust for him, or for his use or benefit, or for the use or benefit of, or in trust for his wife or children, or any of them, ever received, nor is this deponent, or any person or persons (to deponent's knowledge or belief) in trust for him, or the benefit of his wife and children, or any of them, to receive from any person or persons any sum or sums of money, annuity, compensation, or allowance, as a consideration or inducement for resigning the office of town clerk of the city of Bristol aforesaid.

The LORD CHANCELLOR.

The prayer of this petition is, that "I may be pleased " to direct that the petitioners, or any other of the " creditors of the said *Samuel Worrall*, may be at " liberty to examine the said *Samuel Worrall* fully " touching his estate and effects." With respect to so much of the prayer of the petition, I venture to

express my hopes and my belief, that, on the petition of any creditor, the commissioners will take care that Mr. *Worrall* should be fully examined as to his estate and effects, (his lordship proceeded in reading the prayer) “and all matters and things relating thereto, “and particularly as to whether he or any other person or persons in trust for him, or for his benefit, “have received, or is or are to receive any sum or “sums of money, or other valuable consideration, for “having resigned or as an inducement to resign the “office of town clerk of the city of Bristol.” The petition does not ask that the commissioners may call a meeting to examine any other person respecting it, and undoubtedly if there were twenty persons in Bristol who could prove that there was this sort of bargain about the resignation of the town clerkship, between Mr. *Ludlow* and Mr. *Worrall*, unless they were parties in the transaction, they could not possibly object to being examined. But the petition seeks only the examination of Mr. *Worrall*; and on that question it is prayed, “and that for the purpose of “such examination, a meeting of the commissioners “named and authorised in and by the said commission of bankrupt, against the said *Samuel Worrall* “and *Andrew Pope*, and the said *Samuel Worrall*, “*Andrew Pope*, and *John Edmonds* respectively, or “the major part of them, may be held; and that if it “shall appear to your lordship, that the said *Ebenezer Ludlow* is interested in the premises, that “your lordship will be pleased to direct that he may “not act any further as a commissioner, under the “said commissions, or either of them; and that your “lordship will be pleased to direct that the costs of, “and attending the future examination of the said “*Samuel Worrall*, touching the matters in question,

1820.

Ex parte
COSSENS.
 In the Matter
 of
WORRALL.

1820.

Ex parte
COSENS.
In the Matter
of
WORRALL.

“ as well as those that may be incurred by your peti-
“ tioners as otherwise, and also the costs of and inci-
“ dent to this application, may be paid by such per-
“ son or persons, or out of such fund or funds as your
“ lordship shall think just; or that your lordship will
“ be pleased to make such further or other order in
“ the premises as to your lordship shall appear meet.”

I conceive that there is no doubt that it is one of the most sacred principles in the law of this country, that no man can be called on to criminate himself, if he choose to object to it; but I have always understood that proposition to admit of a qualification with respect to the jurisdiction in bankruptcy, because a bankrupt cannot refuse to discover his estate and effects, and the particulars relating to them, though in the course of giving information to his creditors or assignees of what his property consists, that information may tend to shew he has property which he has not got according to law; as in the case of smuggling, and the case of a clergyman carrying on a farm, which he could not do according to the act of parliament, except under the limitation of the late act; and the case of persons having the possession of gunpowder in unlicensed places, whereby they became liable to great penalties, whether the crown takes advantage of the forfeiture or not; in all these cases the parties are bound to tell their assignees, by the examination of the commissioners, what their property is, and where it is, in order that it may be laid hold of for the purposes of the creditors. The same principle applies in some measure to persons who are called and who are examined as witnesses in bankruptcies; as for instance in a case which I recollect to have happened in our time, where an individual had a sum of money put into his hands by a man who had a fancy to be a

member of parliament, and that sum of money he had most faithfully employed, according to the instructions of his employer, in certain transactions with the electors, who were to return that gentleman to parliament; and he was called before the commissioners, and asked about the money, and was fixed with the fact that he had the money, which he denied; he was then asked what he had done with it; and he said he would not tell what he had done with it. There the court said, they would not oblige him to tell what he had done with it, covering it in this way, that if he did not choose to say what he had done with it, the ends of justice required that it should be considered as in his possession, and that he should account for the amount of it. They then enforced the civil demand, and kept clear of the misdemeanor, in respect of which he was liable: for if a man do not choose to say what he has done with the money, because he has not legally employed it, he may refuse to say that he has used it illegally, but then he must be considered as saying that he has not employed it at all. Now, in this case, Mr. *Worrall* had the misfortune to become a bankrupt, and he held, at the time of his bankruptcy, the office of town clerk of Bristol. It appears that subsequently to his examination before the commissioners, he had resigned that office; and there is no question before me with respect to the legality of that resignation, or whether it was an office or a sort of office that is said to be saleable; but I apprehend there is no doubt that the office of town clerk of the city of Bristol is one connected with the administration of justice, and therefore not saleable. Mr. *Worrall* states, that having become a bankrupt, he was induced, by a consideration of what he thought it his duty to a corporation of which he had been so long a member, no longer to hold the

1820.

Ex parte
COSENS.
In the Matter
of
WORRALL.

1830. office of town clerk, and therefore he resigned it.
Having resigned it, Mr. *Ebenezer Ludlow*, who I understand is a lawyer, is now the town clerk of Bristol, and being the town clerk, he happens also to be one of the five commissioners, and a quorum commissioner in Mr. *Worrall's* bankruptcy, in which there are two quorum commissioners. Mr. *Worrall* says, that he made this resignation of the office of town clerk, now in the possession of Mr. *Ludlow*, without any remuneration, and with that purity which such an appointment ought to be abandoned and taken. But the petitioners have a notion that he has received some consideration in money, annuity, engagement, promise, or gratuity. They state that some such consideration passed between them. Now if that consideration did pass between them, and if it could be stated to be a valuable consideration, as, for instance, (and I put it merely hypothetically), if Mr. *Ludlow* thought it proper to give a bond to Mr. *Worrall* in consideration that he would resign the office, I apprehend nobody can doubt that Mr. *Worrall* might have been asked whether he had a bond for a sum of money, and whether it was given before the resignation of the office or after. Supposing there had been such a consideration passing, that had no sort of connection with the resignation, if Mr. *Ludlow* had done that, which I know many respectable people at the bar would have done; what many learned lawyers in the course of their profession have done; if he had, out of that respect to the individual to whom he had happened to have become obliged, or to whom he owed a debt of gratitude for former services not belonging to and not connected with the resignation, and had said, "I give you voluntarily a bond, security, or annuity, for your benefit, for the residue of your life;" now I do not know whether a creditor

Ex parte
Cossens.
In the Matter
of
Worrall.

should, or should not say to the commissioners, "Bring that bond into the mass of property that is to be distributed among us, although the fact clearly is, that we never could have had that, unless it was given to the bankrupt with quite a different object than any connected with our interest or welfare." Yet, if such a bond was meant as a provision or annuity, or any thing of that sort, and if it had become the property of the bankrupt before he got his certificate, there can be no doubt, though the transaction would fail in its object, yet the thing that was meant to be given for the support of Mr. *Worrall* would, in that case, become property divisible among his creditors and property, a disclosure, with respect to which, must have been made. So again, I myself am under great difficulty in saying, if the question here had been put quite in a different way, that an answer could not have been compelled to the question, or rather I should say, to a question of a different sort; because, if he were asked this question, "Did Mr. *Ludlow* before your bankruptcy, or since your bankruptcy, give you a bond for any sum of money, or did he give you any thing else which in your hands is our property, you not having got your certificate," and had stopped there, I apprehend that the question could not possibly have been demurred to. But when they come to ask the question in the way they here ask it, and confined to the terms in which they put it, when they put it on the bankrupt to discover that he has been concerned in that which is illegal, when they call upon him distinctly to say, "Did you, through an illegal act, acquire property, and we will put the question in no other terms," I do not think that blame can belong to Mr. *Ludlow*; for I confess, if I had been

1820.

Ex parte
COSENS.
In the Matter
of
WORRALL.

1820. sitting there as a commissioner, I should not have thought that I was extremely blameable if I had done that, which to my knowledge, every judge in the country used to do, though it is not so much in practice now as it was at that time; namely, if a counsel put a question to a witness, the judge would have told him that he was not bound to answer it. Mr. *Ludlow* happened in this case to be unquestionably in a very difficult situation, and for the difficulty of that situation some allowance ought to be made; and if another meeting is to be called, and the examination proceeds, it will be for Mr. *Ludlow* to consider, (and I am sure he will decide for himself, as he ought to do), if there are other commissioners who can attend the meeting, whether it will not be more delicate, that he should leave that examination to the other commissioners. I desire it to be understood that I am not pronouncing any reflection on Mr. *Ludlow*. He was in a very difficult situation. Then the point I have now to decide is, whether I am to order a meeting to be called for the purpose stated in the prayer of this petition, and upon the best judgment I can form, the question there proposed is not that which, if I had the examination, I should put to the bankrupt: I believe the bankrupt meant to answer that question; but on looking at the affidavit, I agree with the criticism Mr. *Heald* has made on it; for undoubtedly it is open to this observation, that by possibility it might have been an arrangement that he was to receive some emolument between the time of the examination and the time of the swearing of the affidavit; but do not let me be understood to say, there has been any such arrangement, but only that there is an interval of time not filled up; yet that is not a circumstance which calls

Ex parte
Cossens.
In the Matter
of
Worrall.

on me to grant the prayer of this petition, because I conceive, as the rule of law is, that you are not bound to criminate yourself, with the exception to which I have been alluding; so I apprehend, that if a man has gone on answering questions that had a tendency to criminate himself, he may stay in answering those questions, wherever he pleases, you cannot carry him further than he chooses voluntarily to go himself. When I have said this I may add, as Mr. *Hart* said, that the creditors may themselves call a meeting of the commissioners, in order to examine into the state of the property, and to have it distinctly answered, whether Mr. *Worrall* has any property consisting of any bond, security, engagement, or any thing else which he received, either before his bankruptcy, or since his bankruptcy, other than that which he has already particularly disclosed; and I apprehend they may ask him whether he has the bond of A. B. or the bond of C. D. or the bond of E. F. and so on; but I do not think that they could couple that with questions relating to the illegal consideration, nor indeed is it necessary, for when they have once got the disclosure that there is such a bond or such a security, and if it be available, the creditors will have the benefit of it, whatever the security was: I say, if an available bond, or if an available security, because I should be unwilling to go the length of saying, that I admit a bond or security, which is given on the resignation of an office connected with the administration of justice, can be an available security for any body of creditors, but they have a right to know whether there does exist a bond or security, and to make the most of it, if any such there be. Under these circumstances, being perfectly confident that no commissioners will refuse to call a meeting on the

1820.

Ex parte
COSSENS.
In the Matter
of
WORRALL.

1820. application of the creditors, and to examine into the question as far as the law will allow, by putting all
Ex parte lawful questions; and what are lawful questions in
 COSSENS. In the Matter of my judgment, I have endeavoured as well as I can,
 WORRALL. in the course of what I have addressed to you, to explain; I think it is best to dismiss this petition without costs.

Mr. *Heald* and Mr. *Rose* appeared for the petitioners.

Mr. *Hart* and Mr. *Cross* for the bankrupt.

Mr. *Wetherell* for Mr. *Ludlow*.

LINC. INN,
 August 4,
 1820.

Ex parte WILLIAMSON.—In the matter of
 SMITH and HAMPSHIRE.

Where the petitioner swore positively to a debt, and was contradicted by the bankrupt, there being no other evidence, an issue was directed, at the trial of which the bankrupt and the petitioner were to be examined.

THIS was an appeal from the decision of the Vice Chancellor. The bankrupts were scribbling and fulling millers, and also dealers in oil, which they retailed to the clothiers who used their mills. The petitioner was an oil merchant, and for some years had supplied the bankrupts with oil. Upon the bankruptcy he applied to prove a debt due for oil against the joint estate; but the commissioners refused the proof, upon the evidence of Hampshire, who deposed, that Smith and himself had, previous to the debt being contracted, dissolved partnership as to the oil trade, and that they had given *Williamson* verbal notice of

the dissolution; since which time *Smith* had carried on the oil trade on his own account, and the oil furnished by *Williamson* was to the separate credit of *Smith*. *Smith* had absconded, and was supposed to be in America. It was stated, that he had burned the partnership books.

1820.

Ex parte
WILLIAMSON.
In the Matter
of
SMITH and
HAMPSHIRE.

Williamson presented his petition to be permitted to prove against the joint estate; and by his affidavit denied, that the bankrupts had given to him any notice of the dissolution of their partnership in the oil trade; and he positively stated, that he had furnished the oil upon the joint credit of both the bankrupts, and that the invoices were made out to both of them, and not to *Smith* alone.

The Vice Chancellor, upon hearing *Williamson's* affidavit, and one by the bankrupt contradicting it, read, dismissed the petition; upon which the petitioner appealed to the Lord Chancellor, insisting, as the affidavits were contradictory, that an issue or an action ought to be directed.

THE LORD CHANCELLOR.

It is admitted, that, up to a certain period, the bankrupts were in partnership together in the oil trade. Now, if there had been no bankruptcy, the petitioner might have had a joint action, which, as there is no evidence of notice of the dissolution having been given to him, could not have been defended; then is it not too much to say, because in bankruptcy you get at the bankrupt's evidence, that the petitioner, on that account, shall be concluded?

An issue, at the trial of which both the bankrupt

1820. and the petitioner were to be examined, was directed.

Ex parte
WILLIAMSON.
In the Matter
of
SMITH and
HAMPSHIRE.

Mr. *Heald* and Mr. *Buck* for the appellant.

Mr. *Shadwell* for the assignees.

LINC. INN, *Ex parte* EAGLE.—In the matter of TAYLOR.
August 7,
1820.

A commission, having been superseded with costs, to be paid by the petitioning creditors; one of them, being a woman, after the costs were taxed, married; her husband ordered to pay the taxed costs within a fortnight.

THE commission had been superseded with costs, to be paid when taxed by the petitioning creditors. The costs were taxed, and one of the petitioning creditors, who was a woman, afterwards married. This petition was, that she and her husband might be ordered to pay the taxed costs within four days, or stand committed.

Mr. *Cullen*, for the respondents, contended, that the court would act by analogy to the rule of the courts of law; where, if a judgment has been had against a woman who afterwards marries, the creditor must bring his action on the judgment, so in the present case, the order could not be enforced against the husband, who was not a party to the petition, upon which it was made.

Mr. *Buck* for the petition.

THE LORD CHANCELLOR.

This is not like a judgment. The petitioner is entitled to an order, but not such an one as prayed by

the petitioner. I shall order the money to be paid by the husband within a fortnight, and if it be not then paid, the petitioner may apply for the four day order.

1820.

Ex parte
EAGLE
In the Matter
of
TAYLOR.

Ex parte GITTON.—In the matter of GITTON.

LINC. INN,
Aug. 5,
1820.

MR. MONTAGU applied by motion on the part of the petitioner to have the hearing of the petition postponed. He was proceeding to read an affidavit, when

In strict practice, the application to postpone the hearing of a petition cannot be by motion; but if the opposite party do not object to the application by motion, affidavits filed after the petition day may be read in support of it.

Mr. Heald objected, that it was filed after the petition day.

The LORD CHANCELLOR.

The strict mode of proceeding is, that if either party desire that a petition may stand over, a petition must be presented for that purpose, but I never yet knew the application by motion objected to. If such objection be now taken, a petition must be presented.

Mr. Heald waived the objection.

The LORD CHANCELLOR.

Then if this is to be considered as a motion, I apprehend the party making the motion may read an affidavit filed at any time.

LINC. INN,
Aug. 8,
1820.

Ex parte TRUSTRUM.—In the matter of
TRUSTRUM.

Although the affidavits in support of a petition, and those in opposition to it are conflicting, yet the court ought to hear them read, and the arguments of counsel, before it sends the parties to try the question at law.

Where the trading upon the proceedings was only proved by a single witness, who, in an affidavit filed upon a petition to supersede the commission, contradicted that which he had formerly deposed to before the commissioners, the court superseded the commission.

MR. MONTAGU applied to have a petition of appeal heard at an early day. He said the original petition presented a case of great hardship. It was to supersede the commission which had issued at the instance of certain persons who had conspired to make the petitioner a bankrupt, although he had never engaged in trade, and was not in any way subject to the bankrupt laws. He said, when the original petition was called on before the Vice Chancellor, he was informed by the counsel for the respondents, that the affidavits in support of the petition, and those in opposition to it, were contradictory, and that his Honor, without hearing the affidavits read, and merely upon the statement of the counsel on one side, determined not to hear the petition, but to try the validity of the commission at law. He contended, that this decision was contrary to the principles and practice of the court sitting in bankruptcy, as had been solemnly determined in a similar case upon an appeal from the Vice Chancellor, when his lordship had said: "It has at all times been the course of proceedings for this court to take the assistance of a jury, when there is so much of doubt that the court feels such assistance to be necessary to the right determination of the case. But it has never been the practice to put the parties to the expense of a trial at law, without first hearing all the evidence read, and the case fully argued, unless the counsel on both sides agree in stating that such must necessarily be the result,

“ if the matter were gone into (a).” He did not admit that the affidavits were conflicting, but he contended, even if they were, yet as the legislature had given the subject, in questions arising out of bankruptcy, a cheap and summary remedy by petition, a “*festinum remedium*, which contributes not less to the saving of expense than to the saving of time (b),” that the court could not refuse to hear a petition, because there happened to be contradictory statements in the affidavits; for it was the duty of a judge sitting in bankruptcy, to compare and balance the conflicting testimony, which duty the subject had an undoubted right to call upon him to exercise; and if, after hearing the affidavits read, and the comments upon them by the counsel on each side, the judge could not come to a decision, then, and not before, he might call in the assistance of a jury.

1820.

Ex parte
TRUSTRUM.
In the Matter
of
TRUSTRUM.

The Lord Chancellor was clearly of opinion, that the court ought to hear the affidavits read, and the arguments on each side, before it sent the party to a jury, and he directed the petition to be put in the paper of petition for the present sittings.

11th of August.

The petition was to supersede the commission, which was stated to have issued upon a conspiracy by certain persons therein named, who had procured a man to personate the bankrupt in purchasing timber, and in other acts of trading, and which had been proved before the commissioners as the acts of the bankrupt.

(a) *Ex parte* Heygate ante 446. (b) *Per* Abbot, C. J.
Ex parte Cowan, 3. Barn and Ald. 127.

1820.

Ex parte
TRUSTRUM.
 In the Matter
 of

TRUSTRUM.

Upon the petition being opened, the Lord Chancellor desired the proceedings to be handed up to him; and by an inspection of them it appeared, that the trading had been proved before the commissioners by one person only, of the name of Roberts, whose deposition was directly at variance with an affidavit he had made in support of the petition.

The Lord Chancellor was of opinion, he could not support a commission, where the only proof of the trading was by a witness to whose testimony no credit could be given.

Commission superseded.

Mr. *Heald* and Mr. *Montagu* for the petition,

Mr. *Wakefield* and Mr. *Hone* for the assignees and the petitioning creditor.

LINC. INN, *Ex parte* HUNTER *ex parte* DIXON.—In the matters
 Aug. 11, of HENRY JACKSON, JOHN JACKSON, and
 1820. others, and THOMAS GOWLAND,

Two of three as-
 signees become
 bankrupt. The
 solvent assignee
 pays a debt due
 from the three
 to the estate.
 Held that he is
 entitled to prove

HENRY JACKSON having become a bankrupt, *John Jackson*, *Gowland*, and *Gilbee*, were duly appointed the assignees of his estate and effects, and were afterwards removed by the order of the Lord Chancellor, and *Mavor* was chosen the sole assignee a third of the debt against each of the other assignees' estates. If either of the estates should prove deficient, quære whether he can prove a moiety of the deficiency against the estate of the other assignee.

in their stead. Afterwards, a joint commission of bankrupt issued against *John Jackson* and his partners, under which they were duly found and declared bankrupts. By an order bearing date the 26th of July, 1816, *John Jackson*, *Gowland*, and *Gilbee*, were ordered to come to an account before the commissioners for the estate and effects of *Henry Jackson*, received by them. The commissioners found that they had received £2647:18:6. In August 1819, a commission of bankrupt issued against *Gowland*, under which he was duly found and declared a bankrupt. By an order made in the matter of *Henry Jackson*, upon the petition of *Gilbee*, dated the 22d of November 1819, it was ordered that the said *Samuel Gilbee* should be at liberty to pay into the Bank, in the name and with the privity of the Accountant General of the court of Chancery, in trust in the matter of *Henry Jackson*, a bankrupt, and subject to the further order of the court, the said sum of £2647:18:6; and upon payment thereof by the said *Samuel Gilbee* into the Bank of England, in trust as before directed, that the said *John Mavor* should, at the expense of the said *Samuel Gilbee*, prove under the said commission issued against the said *Thomas Gowland*, and also under the commission issued against the said *John Jackson* and his copartners, against the separate estate of the said *John Jackson*, the said sum of £2647:18:6; and it was further ordered, that the dividend or dividends to be declared upon such respective proofs, should be received by and paid to the said *Samuel Gilbee*, until he should have received in the whole, under the said commission against the said *John Jackson* and his copartners, the sum of £1323:19:3, being one third, due to him from the said *John Jackson*, and a moiety of the other one third due to him, from the said *Thomas*

1820.

Ex parte
HUNTER,
ex parte
DIXON.

In the Matters
of
HENRY JACK-
SON, JOHN
JACKSON, and
others, and
THOMAS
GOWLAND.

1820. *Gowland*, of the said sum of £2647:18:6, unless the said *Samuel Gilbee* should receive any dividend from the estate of the said *Thomas Gowland*, and so as in the whole he did not receive from both estates more than two thirds of the said sum of £2647:18:6; and that upon such payment into the Bank being made by the said *Samuel Gilbee* as aforesaid, and until such proofs as aforesaid should be made, he the said *John Mavor* was thereby restrained from proceeding against the said *Samuel Gilbee* upon the said order, bearing date the 15th day of May, 1819.

Ex parte
HUNTER,
Ex parte
DIXON.
In the Matters
of
HENRY JACK-
SON, JOHN
JACKSON, and
others, and
THOMAS
GOWLAND.

The assignees of *Gowland*, and the assignees of *John Jackson*, now severally presented petitions, stating, that *Mavor* had tendered proofs to the commissioners under the respective commissions, for the said sum of £2647:18:6, which had been allowed by the respective commissioners, who were of opinion that the order of the 22d of November, 1819, was imperative upon them. And the petitioners submitted, that the debt due and owing by *John Jackson*, *Gowland*, and *Gilbee*, to the estate of *Henry Jackson*, was a joint and not a separate debt; and that *Mavor*, as assignee of the estate to which such joint debt was due, could not be admitted to prove the same against the separate estates of *John Jackson*, and *Gowland*, so long as *Gilbee* continued solvent. And they also submitted, that if, in the respect of the payments made by *Gilbee* in discharge of such joint debt, he was entitled to a contribution from the estates of *Gowland*, and *John Jackson*, he was at the utmost entitled to prove the amount of one third of such contribution, against the estate of *John Jackson*, and the amount of one other third against the estate of *Gowland*. The petitions prayed, that the proofs might be ex-

panged, and the commissioners directed to admit the proof to be made by *Gilbee*, or by *Mavor* on his behalf, against the respective estates of *John Jackson*, and *Gowland*, to the extent only of one third part of the sum paid by him in discharge of the debt due from himself, *Gowland*, and *John Jackson*, to the estate of *Henry Jackson*.

1820.
Ex parte
 HUNTER,
Ex parte
 DIXON.
 In the Matters
 of
 HENRY JACK-
 SON, JOHN
 JACKSON, and
 others, and
 THOMAS
 GOWLAND.

This petition having been heard, a difference arose respecting the minutes. It was insisted on the part of *Gilbee*, that his lordship had ordered the proof to be against the estates of *John Jackson*, and *Gowland*, respectively, for one third part of the sum paid in discharge of the debt due to the estate of *Henry Jackson*; and that if either of the estates of *John Jackson*, and *Gowland*, should prove deficient, then that *Gilbee* should prove for a moiety of the deficiency against the other estate.

Mr. *Montagu* for *Gilbee*. If several persons jointly contract a debt, which is satisfied by one of them, he is not only entitled to a contribution from the others, but if any one of them be unable to pay his share, the others must bear his proportion of the debt equally amongst them. To be sure, a case has lately been decided in the other court (a), where it was held, that if a partner paid the partnership debt, he could only prove, against the estates of the other individuals of the firm, the amount of their respective shares of the debt paid: but I understand in that case the Vice Chancellor proceeded upon quite a new principle. It may

(a) *Ex parte* Watson, ante 499; and *Ex parte* Smith, ante 492.

1820. be a very correct one, but it is quite new to me. It is
 ——— this: That proof is equivalent to payment. So that
Ex parte HUNTER, when a man proves a debt under a commission, it is
Ex parte DIXON. precisely the same, whether he receives five, ten, or
 In the Matter twenty shillings in the pound.

of
 HENRY JACK-
 SON, JOHN
 JACKSON, and
 others, and
 THOMAS
 GOWLAND.

The LORD CHANCELLOR.

There is a case I think in *Douglas*, in which Lord
Mansfield said, proof was equivalent to payment, but
 that has been frequently overruled.

Mr. *Christian*, *amicus curiæ*, mentioned *Deering v.*
Earl of Winchelsea (a), *Cowell v. Edwards* (b).

The LORD CHANCELLOR. I remember the case
Deering v. Earl of Winchelsea. I argued it, and very
 angry I was with the decision; but I lived long
 enough to find out that one may be very angry and
 very wrong. It is not necessary for me now to de-
 cide the point, as possibly both estates may be suffi-
 cient.

Let a third be proved against each estate with li-
 berty to apply.

Mr. *Hart*, Mr. *Stephen*, Mr. *Raithly*, Mr. *Trower*,
 and Mr. *Rose*, respectively appeared for the different
 sets of assignees, and for Mr. *Mavor*.

(a) 2 Bos. and Pull. 270.

(b) 2 Bos. and Pull. 268.

Ex parte HENDERSON.—In the matter of
HENDERSON.

(*u*)

LINC. INN.
August 9,
1820.

PETITION to stay certificate on the ground of £5 lost at a horse-race. The Vice Chancellor made the order for staying the certificate; and from this the bankrupt now appealed.

Upon a petition to stay a certificate, issue directed to try whether the bankrupt had lost £5 at a horse-race.

It appeared by the bankrupt's last examination before the commissioners, that he subscribed to a stakes of £50, to be run for at the last Bedenell races, to which there were ten subscribers. It was run for on the Easter Thursday preceding the issuing of the commission. The bankrupt had subscribed and paid, as the others, £5 for the stakes, and 5s. for an entertainment. The bankrupt's mare ran for the stakes, and was beat, whereby he lost his £5. This statement was corroborated by several other persons examined. On a subsequent examination, one *Small* said, that, prior to the race, the bankrupt became more doubtful of the success of his mare, and therefore prevailed upon *Small* to take upon himself the bankrupt's risk.

Mr. *Horne* and Mr. *Rose*, in support of the order, contended, that the court would not suffer the bankrupt, when he began to feel the effect of what he had admitted upon his last examination before the commissioners, to falsify it, and, against many other wit-

1820. nesses, to gain credit for a new story. Such a practice would lead to the most dangerous consequences.

Ex parte
 HENDERSON. CES.
 In the Matter of
 HENDERSON. Mr. Cullen, for the bankrupt, said, the petitioner, who was a comparatively small creditor, could have none but a vindictive motive; and contended in favor of the credibility of the statement made by *Small* and the bankrupt.

The LORD CHANCELLOR.

The legislature having said, that losing this sum is to prevent the bankrupt from gaining his certificate, I have no authority to inquire into the petitioner's motives, but am simply to ascertain the fact. I shall, therefore, in this case, the petitioner having proved, and not being able, therefore, to bring an action at law, direct an issue, in which the petitioner must be plaintiff, to try whether this was the bankrupt's loss. The last examination of the bankrupt must be read to the jury upon the trial; and I will make a declaration, that, under the statute, it amounts to proof of the gaming, unless it shall be answered by other evidence.

On the trial it may be proved, on the other side, that this was *Small's* loss, and not the bankrupt's.—The case of *ex parte Kennett* is distinguishable from the present. The bankrupt had made no deposition in that case.

ORDER.

Now, upon hearing the said petition read, and what was alleged by the counsel for the said parties, I do order that the parties do proceed to a trial at law, in his Majesty's courts of King's Bench, at the assizes to be holden for the county of Northumberland, upon the

following issue, viz. Whether the bankrupt, *Francis Henderson*, did at one time lose the sum of £5 at a horse-race; in which issue, the said *Collingwood Augustus Hamilton Richardson* to be plaintiff, and the said *Francis Henderson* to be defendant, who is to name an attorney to appear, receive a declaration, and plead to issue; and it is hereby referred to Mr.

1820.

Ex parte
HENDERSON.
In the Matter
of
HENDERSON.

one of the Masters of the Court of Chancery, to settle the said issue between the parties, in case they should differ about the same. And I do order, that the examination taken under the commission be produced on the said trial, and be considered as sufficient evidence of the above fact, unless the said bankrupt can by evidence prove that he did not lose at one time the sum of £5 at a horse-race; and all parties to produce upon the trial of the said issue, all such books, papers, and writings in their custody or power, relating to the matters in question, as any of the parties shall require, upon reasonable notice to be given for that purpose. And all further directions on the matter of the said petition, together with the consideration of costs, are hereby reserved until after the trial of the said issue, when any of the parties are to be at liberty to apply to me in relation thereto, as they shall be advised, when such further order shall be made as shall be just.

LINC. INN, *Ex parte* CARSTAIRS.—In the matter of THOMAS
 Aug. 3, 4, SLADE and THOMAS SLADE the Younger.
 & 7, 1820.

It is competent for creditors executing a deed of composition with the principal debtor and certain of his sureties, to reverse their remedies against other sureties, **THE** petitioners were the assignees of Messrs. Kensington and Co. and the prayer of the petition was to reverse an order for expunging a proof made by his Honor the Vice Chancellor.

It appeared, that, previous to the year 1809, Messrs. *Kensington, Styant, and Adams*, acted as the bankers of *John Ellill*, and in that capacity made to him large advances in cash, upon the deposit of various securities, and amongst others, of bills of exchange for £7957:9:5, drawn by him upon, and accepted by *Thomas Slade* and *Thomas Slade* the younger, and of various other bills of exchange upon other persons; and also the title deeds of a certain freehold estate belonging to *John Ellill*. By an indenture made the 23d day of June 1811, between *George Doubleday* and *Anthony Easterby*, *Walter Hall* and *Frederick Hall*, of the first part; *Arthur Mowbray*, *Joseph Bulmer*, *John Chapman*, *Christopher Blackett*, *Matthew Atkinson*, *John Molyneux*, *James Forster*, *George Riddell*, and *Robert Dick*, being the assignees duly chosen of the estate and effects of *Aubone Surtees* and *John Surtees*, of Newcastle-upon-Tyne, bankers, of the second part; the said *Arthur Mowbray* and *George Lewis Hollingworth*, *William Shields*, *William Boulton*, *John Wetherell*, and *Christopher Mason*, of the third part; *Richard Puller* the elder, and *Richard Puller* the younger, of the fourth part; *Robert Skelton*, of the

fifth part; Sir *John Cox Hippesley*, *George Simson*, and *Arthur Mowbray*, of the sixth part; the several persons, creditors of the said copartnership of *Easterby, Hall*, and Co. who should execute the indenture, of the seventh part; and *Thomas Maltby*, *Thomas How Masterman*, and *Samuel Brown*, assignees of the estate and effects of *John Ellill*, of Queen-street, Cheap-side, in the city of London, merchant, a bankrupt, of the eighth part: reciting, that the said *George Doubleday*, *Anthony Easterby*, *Walter Hall*, and *Frederick Hall*, together with the said *Aubone Surtees* and *John Surtees*, did, some years ago, enter into and establish a copartnership and joint adventure for the winning and working of mines of lead ore, and other minerals and fossils, and for manufacturing and disposing of the produce thereof, under the firm and style of *Easterby, Hall*, and Co. and, in the course of their said joint trade or adventure, became possessed of, and beneficially entitled to various mines, veins, &c. under, or by virtue of several leases, granted for several terms of years by the respective proprietors thereof, subject to the several rents &c. and also became possessed of, or entitled unto various engines, machinery, &c. and did also, in the course of their said joint trade and adventure, become indebted to various persons in large sums of money, advanced by, to, or on account of their copartnership. And that by indenture of assignment, bearing date 10th day of July, 1802, the said *John Doubleday*, *Anthony Easterby*, *Walter Hall*, and *Frederick Hall* assigned the premises comprised in five of the said several leases, constituting part of the said copartnership property, unto *Henry Frewitt*, of North Shields, by way of mortgage, for securing the repayment to him, his executors, administrators, or assigns, of the principal sum of £3000

1820.

Ex parte.
CARSTAIRS.
In the Matter
of
SLADE the elder & younger.

1820.

Ex parte
CARSTAIRS.
In the Matter
of
SLADE the elder & young-
er.

advanced and lent by him to the copartnership of *Easterby, Hall, and Co.* together with interest for the same, after the rate therein mentioned; which said principal sum of £3000 still remained due and owing, all interest for the same being fully paid and satisfied. And that a commission of bankrupt under the Great Seal of Great Britain, bearing date at Westminster the 4th day of July, 1806, was awarded and issued against the said *Aubone Surtees* and *John Surtees*, together with *Rowland Burdow, John Brandling*, and *John Embleton*, their copartners in trade, as bankers, and they were thereupon duly found and declared bankrupts; whereupon the said copartnership, carried on under the firm of *Easterby, Hall, and Co.* was, so far as respects the said *Aubone Surtees* and *John Surtees*, wholly dissolved and determined. And that by indenture of assignment, bearing date the 13th day of May, 1808, and made between *George Doubleday, Anthony Easterby, Walter Hall*, and *Frederick Hall*, of the one part; and the said *Arthur Mowbray, George Lewis Hollingsworth, William Shields, William Boulton, John Wetherell*, and *Christopher Muson*, of the other part; reciting, amongst other things, that the said *Arthur Mowbray, George Lewis Hollingsworth, William Shields, William Boulton, John Wetherell*, and *Christopher Muson*, had, at different times, advanced to and for the use of the said *George Doubleday, Anthony Easterby, Walter Hall*, and *Frederick Hall*, various sums of money, by, or upon the discount of bills of exchange drawn by them on the several persons therein mentioned; and had agreed, in case the occasion of the said *George Doubleday, Anthony Easterby, Walter Hall*, and *Frederick Hall*, should require it, to discount other bills of exchange, to be drawn and

accepted as therein is expressed. It was by the same indenture of assignment witnessed, that, in consideration of the premises, and for the other considerations therein expressed, the several undivided parts or shares of the said *George Doubleday, Arthur Easterby, Walter Hall, and Frederick Hall* respectively, of and in the several mines and hereditaments, and the parts and shares of mines and hereditaments therein particularly described; and also the entirety of various messuages, closes, lands, and hereditaments therein also described, (being part of the said leasehold mines and premises of and belonging to the said co-partnership of *Easterby, Hall, and Co.*) were assigned, transferred, and set over by the said *George Doubleday, Anthony Easterby, Walter Hall, and Frederick Hall*, unto the said *Arthur Mowbray, George Lewis Hollingsworth, William Shields, William Boulton, John Wetherell, and Christopher Mason*, their executors, administrators, and assigns, for the respective residues of the several terms of years comprising the same premises respectively, upon various trusts in the said indenture of assignment declared for securing the payment of the several sums of money theretofore advanced, or thereafter to be advanced by the said *Arthur Mowbray, George Lewis Hollingsworth, William Shields, William Boulton, John Wetherell, and Christopher Mason*, for the use, or on account of the said *George Doubleday, Anthony Easterby, Walter Hall, and Frederick Hall*, by way of discount upon bills of exchange, with the usual interest and expenses, by the ways and means, and in manner therein particularly mentioned, and with such powers and authorities in the respective events therein specified, to enter and take possession of the premises, and work, manage, and conduct the same; and

1820.

Ex parte
CARSTAIRS.
In the Matter
of
SLADE the elder & younger.

1820.

Ex parte
CARSTAIRS.
In the Matter
of
SLADE the el-
der & young-
er.

also to sell and dispose of the same premises, or a sufficient part thereof, for the purposes of the said security, as therein mentioned and contained; and subject to the said security, upon trust for the said *George Doubleday, Anthony Easterby, Walter Hall, and Frederick Hall*, their executors, administrators, and assigns. And reciting, that a considerable sum of money remained due and owing to the said *Arthur Mowbray, George Lewis Hollingsworth, William Shields, William Boulton, John Wetherell, and Christopher Muson*, by virtue of the trusts and provisions of the said last recited indentures of assignment; and that, since the bankruptcy of the said *Aubone Surtees and John Surtees*, the mining concern had been carried on by the said *George Doubleday, Anthony Easterby, Walter Hall, and Frederick Hall*, in partnership, under the firm of *Easterby, Hall, and Co.* without any interference therein by *Aubone Surtees and John Surtees*, or their assigns and without any final settlement of the accounts of the said partners touching the said joint concern up to the time of the said bankruptcy; and that the said *George Doubleday, Anthony Easterby, Walter Hall, and Frederick Hall* had since expended large sums of money in the discharge of many of the subsisting debts and engagements, contracted by the said co-partnership prior to that period; and that, in consequence of such payments, and of the great advances necessary to be made, and which had been made by them for carrying on the said mining concern, become indebted to various persons in sundry large sums of money, and, amongst others, to the said *Richard Puller the younger*, for, and in respect of divers sums of money advanced by them on account, and for the accommodation of *George Doubleday*,

Anthony Easterby, Walter Hall, and Frederick Hall, as continuing copartners, as aforesaid; and that the said *Richard Puller* the elder, and *Richard Puller* the younger, did lately, at the instance and request, and for the accommodation of the said *George Doubleday, Anthony Easterby, Walter Hall, and Frederick Hall*, become liable and engaged to many of the several persons, parties thereto, of the seventh part, being creditors of the said mining concern, for the payment to them of the several large sums of money; by drawing, accepting, or indorsing in their favor, bills of exchange for the respective amounts of the same sums of money, all which bills of exchange had become due; but the said *George Doubleday, Anthony Easterby, Walter Hall, and Frederick Hall*, and the said *Richard Puller* the elder, and the said *Richard Puller* the younger, were unable to take up and discharge the same; and that several of the creditors of the said copartnership of *Easterby, Hall, and Co.* were holders of bills of exchange, as securities for their debts owing to them by the said copartnership, which were drawn by, or on, or accepted, or indorsed by the said *John Ellill*; and of other bills of exchange drawn by, or on, or accepted, or indorsed by Messrs. *Atkinson and Mount*, of Broad-street Buildings, London, merchants; all which bills of exchange were then due; and that a commission of bankrupt had been lately issued against the said *John Ellill*, under which he had been declared a bankrupt, and the said *Thomas Maltby, Thomas How Masterman, and Samuel Brown*, had been duly chosen assignees of his estate and effects; and that the account current between the said *John Ellill* and the said copartnership of *Easterby, Hall, and Co.* had not been made up and

1820.

Ex parte
CARSTAIRS.
In the Matter
of
SLADE the el-
der & young-
er.

1820.

Ex parte
CARSTAIRS.
In the Matter
of
SLADE the el-
der & young-
er.

settled, and it was uncertain to whose favor the balance of such account would appear upon the final adjustment thereof; but that, in consideration of the provisions thereafter contained, for the discharge of the debts of the said copartnership of *Easterby, Hall, and Co.* including the sums of money due and owing upon, and secured by the said bills of exchange, drawn, accepted, or indorsed by the said *John Ellis*, the said assignees of his estate and effects had, with the consent of his creditors for that purpose contained, consented and agreed to accept payment of such sums of money as should be due to his estate upon the balance of the accounts, in the order and course, and pursuant to the trusts and directions thereafter expressed; and that the assignees of the said *Aubone Surtees* and *John Surtees*, with the consent of the creditors at a meeting held for that purpose, were empowered, and had agreed to accept the sum of £10,000, in lieu and satisfaction of the shares and interests of the said bankrupts, and of the said assignees in right of the said bankrupts, of and in the said leasehold premises, and of and in all other the real and personal estates of or belonging to the said *George Doubleday, Anthony Easterby, Walter Hall, and Frederick Hall*, and the said *Aubone Surtees* and *John Surtees*, as copartners, as aforesaid; which said sum of £10,000 was to be considered as a debt due from the said *George Doubleday, Anthony Easterby, Walter Hall, and Frederick Hall*, to the assignees of the said bankrupts, parties thereto of the second part, and to be paid to them as thereafter mentioned; and the said assignees had been further empowered, and it had been further agreed, that they should come in and take the dividend in respect of any balance which might be due to them as assignees of Messrs.

Surtees, Burdon, and Co. from the said copartnership of *Easterby, Hall, and Co.* rateably, and in the order with the other creditors of the said copartnership, parties thereto of the seventh part; and that it had been agreed between the said *George Doubleday, Anthony Easterby, Walter Hall, and Frederick Hall*, that the said copartnership of *Easterby, Hall, and Co.* should be wholly dissolved and determined as from that time; and that in consequence of the dissolution of the said copartnership, it had been agreed between the said *George Doubleday, Anthony Easterby, Walter Hall, and Frederick Hall*, with the consent of the assignees of the said *Aubone Surtees and John Surtees*, and with a view to make a provision for the payment of the debts of the said copartnership, and to wind up and finally settle the concerns of the said copartnership, that the mines and the other leasehold premises thereinbefore mentioned, subject to the rents and covenants payable and to be performed in respect thereof; and also to the said mortgage made to the said *Henry Trewitt*, for the said sum of £3000; and also all the engines, machinery, &c. and all other the effects and stock, &c. (except lead, lead ore, and booze, raised by the said partnership of *Easterby, Hall, and Co.*) should be sold; and that by indenture of even date, made between the said *Arthur Mowbray, George Lewis Hollingsworth, William Shields, William Boulton, John Wetherell, and Christopher Mason*, of the first part; the said *Arthur Mowbray, Joseph Bulmer, John Chapman, Christopher Blackett, Matthew Atkinson, John Molyneux, James Foster, George Riddell, and Robert Dick*, of the second part; the said *George Doubleday, Anthony Easterby, Walter Hall, and Frederick Hall*, of the third part; the said *Walter Hall, Frederick Hall, Richard Puller the elder,*

1820.

Ex parte
CARSTAIRS.
In the Matter
of
SLADE the el-
der & young-
er.

1820.

Ex parte
 CARSTAIRS.
 In the Matter
 of
 SLADE the el-
 der & young-
 er.

Richard Puller the younger, and *Robert Skelton*, of the fourth part; and certain persons in the said indenture particularly named and described, of the fifth part; and the said *Sir John Cox Hippesley*, *George Simson*, and *Arthur Mowbray*, of the sixth part; reciting (among other things) the agreement to dissolve the said copartnership between the said *Anthony Easterby*, *George Doubleday*, *Walter Hall*, and *Frederick Hall*; and that, in consequence of such determination, the said parties thereto, of the fourth and fifth parts, had agreed to purchase the mines and other leasehold premises of or belonging to the said copartnership, and thereafter expressed to be assigned, (subject to the mortgage made to the said *Henry Frewitt*); and also all the engines, machinery, effects, and stock in hand, &c. (except lead, lead ore, and booze, raised by the said copartnership of *Easterby*, *Hall*, and Co.) at or for the price or sum of £330,000; it having been previously agreed between the said contracting parties, that the said sum of £330,000 should be paid at the times, and that the said purchase should be completed upon the terms, and in the manner thereafter mentioned; and reciting, that in order to secure all such debts as were or might be due from the copartnership of *Easterby*, *Hall*, and Co. and in order to satisfy such other claims and demands, if any, which might be made and established upon or against the said copartnership, or either of them; and finally, with a view to an arrangement then already made between the said parties thereto of the third part, as to the disposition of the ultimate surplus of the said purchase-money, (alluding to the beforementioned arrangement), it had been agreed between the said *George Doubleday*, *Anthony Easterby*, *Walter Hall*, and *Frederick Hall*, with the

consent of the assignees; parties thereto of the first part; and of the said mortgagees, parties thereto of the second part; that the said purchase-money, or sum of £330,000, should be paid in manner therein-after mentioned, be secured to be paid to, and should be received by, the said parties thereto, of the sixth part, as trustees, in order that the same might be applied by them for those purposes accordingly, but so that, in the application of such monies, the respective parties thereto of the fourth and fifth parts, in their capacities of purchasers, or those who should or might claim through or under the same respectively, should not be concerned, nor in any wise affected: and further, that, as well the debts and sums of money due and owing to the said copartnership of *Easterby, Hall, and Co.* and intended to be thereby assigned; as also the clear yearly income, rents, and profits of or to arise from 23-50th parts or shares of and in the said mines and premises comprised in the said indenture bearing even date therewith, and of and in the working capital of £70,000, after payment of certain annuities of £500 and £500, should be applicable to the reduction, and complete satisfaction and discharge of such debts and sums of money due and owing from the said copartnership of *Easterby, Hall, and Co.* as should, from the time being, remain unsatisfied, including the debt, if any, which might appear to be due to the estate of the said *John Ellill*, upon the balance of account; and also including the residue of a sum of £15,000 to be paid to the said *George Doubleday* and *Anthony Easterby*; but nevertheless, that the several provisions proposed to be made, were respectively intended to be, and should be accepted and taken by the several and respective creditors of the said copartnership,

1830.

Ex parte
CARSTAIRS.
In the Matter
of
SLADE the el-
der & young-
er.

1832. *in full satisfaction and discharge of their respective debts and demands, as well against the said George Doubleday, Anthony Easterby, Walter Hall, and Frederick Hall, respectively, as against the said Richard Puller the elder, and Richard Puller the younger, as against the estate of the said John Ellill, or against the said Messrs. Atkinson and Mount, respectively, in respect of the said bills of exchange, drawn, accepted, or indorsed by them or any of them respectively, and then remaining over due, with the names of the said Easterby, Hall, and Co. or Hall and Co. thereon; all which bills of exchange were to be delivered up by the respective holders thereof, to be cancelled, upon receiving debentures under the hands of the trustees of the said trust funds, for the amount of their respective debts, payable to the bearer, pursuant to the proviso thereafter contained; but nothing therein contained was intended to operate as a release and discharge to any other person or persons save only and except the said George Doubleday, Anthony Easterby, Walter Hall, and Frederick Hall, Richard Puller the elder, and Richard Puller the younger, and the said Messrs. Atkinson and Mount, and the estate of the said John Ellill; and that, in order to facilitate and promote the said intended arrangements, and as a further consideration and inducement for the acceptance of the other creditors of the said copartnership of Easterby, Hall, and Co. of the said proposed provision for the payment of their debts in full discharge thereof as aforesaid, the said Arthur Monbray, George Lewis Hollingsworth, William Shields, William Boulton, John Wetherell, and Christopher Mason, had, at the request of the said George Doubleday, Anthony Easterby, Walter Hall, and Frederick Hall, consented and agreed wholly to*

Ex parte
Carstairs.
In the Matter
of
SLADE the el-
der & young-
er.

waive, relinquish, and give up all benefit, priority, and advantage whatsoever, to which they the said *Arthur Mowbray, George Lewis Hollingsworth, William Shields, William Boulton, John Wetherell, and Christopher Mason*, were entitled, under and by virtue of the trusts and provisions of the said in part recited indenture of assignment, of the 13th day of May 1808, in respect of the debts due and owing to them from the said last mentioned copartnership: and the said *Sir John Cox Hipplesley, George Simson, and Arthur Mowbray*, having been nominated and appointed, by the several parties interested in the said proposed arrangements, to be trustees for carrying the same into effect and execution — It was witnessed, that, in further pursuance of the said several proposals and agreements thereinbefore recited, and for carrying the same into further effect and execution, and in consideration of the premises, it was declared and agreed, by and between all the said parties, and particularly between the said *George Doubleday, Anthony Easterby, Walter Hall, and Frederick Hall*, did thereby agree, declare, and direct, that the said *Sir John Cox Hipplesley, George Simson, and Arthur Mowbray*, their executors, administrators and assigns, should stand and be possessed of, and interested in, the sum of £146,000, being the purchase-monies for the said 27-50th shares of the said mines and premises, and of and in the interest to become due for the same, upon trust; in the first place, thereout to pay and retain the costs of carrying the said arrangements into effect; and in the next place, thereout to pay to the said *Arthur Mowbray, Joseph Bulmer, John Chapman, Christopher Blackett, Matthew Atkinson, John Molyneux, James Foster, George Ridell, and Robert Dick*, as assignees as aforesaid,

1800.

Es parte
CARSTAIRS.
In the Matter
of
SLADE the elder & younger.

1820.

Ex parte
CARRUTHERS.
 In the Matter
 of
 SLAVE the el-
 der & young-
 er.

their executors, administrators, and assigns; the sum of £10,800 of lawful money of Great Britain, and upon trust, immediately thereafter to apply the ultimate residue or surplus of the said £145,000, and interest, so far as the same should extend, in payment to the several creditors of the said copartnership of *Easterby, Hall, and Co.* (except the said *Richard Puller* the elder, and *Richard Puller* the younger, and the assignees of the said *John Ellill*), excepting only as to such assignees of the said *John Ellill* in regard to the matter thereafter mentioned, of one or more rateable and equal dividend or dividends, upon the amount of the several and respective debts and sums of money justly due and owing to them, the same creditors respectively; and also the said *George Doubleday* and *Anthony Easterby*, by their executors, administrators, or assigns, of one or more rateable and equal dividend or dividends upon the said sum of £15,000, agreed to be paid to them as aforesaid; all such dividends to be made in a just and equal proportion to the amount of the same debts and sums of money respectively, without any priority or preference of any one or more of them, to any other or others of them, it being the intention and agreement of the said parties thereto, that the said £15,000 should be payable and paid to the said *George Doubleday* and *Anthony Easterby*, with the debts of the said copartnership of *Easterby, Hall, and Co.* thereby provided for; and it was thereby agreed, that whereas Messrs. *Kensington* and Co. Messrs. *Harding* and *Hill*, and Messrs. *Lopez* and *Collins*, lately received respectively such sums by and out of the estate of the said *John Ellill*, it was thereby declared that a dividend, rateably with the other creditors, should be paid out of the said £146,000 to the said assignees of the said *John Ellill* upon the

said several sums so received by the said Messrs. *Kensington* and Co. Messrs. *Harding* and *Hill*, and Messrs. *Lopez* and *Collins*, out of the estate of the said *John Ellill*, and whereby the said estate had been damnified, but not upon any other sum or balance; and it was expressly agreed and declared between and by the said parties, that the several trusts and provisions thereinbefore contained for payment of the debts of the said firm or copartnership of *Easterby, Hall*, and Co. were to be forthwith accepted and taken by the several and respective creditors thereof in full satisfaction and discharge of their respective debts and demands, and that in case any one or more of the creditors for the time being of the said firm or copartnership of *Easterby, Hall*, and Co. or of the said *George Doubleday, Anthony Easterby, Walter Hall*, and *Frederick Hall*, as continuing partners therein, should, upon request for that purpose made by the said trustees or trustee for the time being, neglect, or refuse to execute the indentures, or if any such creditor or creditors, having notice of the trusts and provisions therein contained, should commence, prosecute, continue, or carry on any action or actions, suit or suits, or other proceedings whatsoever, either at law or equity, for the recovering of all or any part of the debt or respective debts due and owing to the same creditor or creditors respectively, either against the person or effects of them the said *George Doubleday, Anthony Easterby, Walter Hall*, and *Frederick Hall*, or any of them, their, or any of their heirs, executors, or administrators, or against the said *Richard Puller* the elder, and *Richard Puller* the younger, or either of them, their, or either of their executors or administrators, or the estate of the said *John Ellill*, then,

1820.

Ex parte
CARSTAIRS.
In the Matter
of
SLADE the elder & younger.

1890.

Ex parte
Carstairs
 In the Matter
 of
 SLADE the el-
 der & young-
 er.

or in any of these cases, the creditor or creditors so neglecting, refusing, or declining to execute those presents, or commencing or continuing any such action, suit, or other proceedings, after notice thereof as aforesaid, and his, her, or their respective executors and administrators should be wholly excluded and debarred from taking any benefit under the trusts and provisions thereinbefore contained, or any of them; and the dividend or respective dividends to which such creditor or creditors, his, her, or their executors or administrators would have been entitled from time to time, in case he, she, or they, respectively, had executed the presents, should be retained and set apart by the said trustees or trustee for the time being, and invested from time to time in their or his names or name, in, or upon government securities, at interest, and should constitute a fund for indemnifying and reimbursing the several and respective persons liable or responsible to or for the payment of the debt or respective debts upon which such dividend or dividends should be made, and their respective estates and effects for or in respect of all such sums and sums of money, loss, costs, charges, and expenses, as they respectively should pay, suffer, or sustain, expend, or be put unto for or by reason of such debt or respective debts, and all actions, suits, claims, and demands in respect thereof, and should be paid, applied, and disposed of according for answering the purpose of the said indemnity, from time to time, as occasion should require. And the indenture further witnessed, that the said several persons, parties thereto, of the third and seventh parts, being respectively creditors of the said copartnership of *Easterly, Hall, and Co.* did testify their respective assent to, and approbation of the said presents, and the said recited indenture of assignment

bearing even date therewith, and the trusts and provisions in and by the same indentures respectively created, expressed, and contained, for payment of the debts due and owing from the same copartnership; and in consideration of the said trusts and provisions, all the said several persons, parties thereto, of the third and seventh parts respectively, made, fully and clearly remised, released, acquitted, exonerated, and discharged the said *George Doubleday, Anthony Easterby, Walter Hall, and Frederick Hall*, and also the said *Richard Puller the elder*, and *Richard Puller the younger*, and each and every of them, their and each and every of their heirs, executors, administrators, and assigns, of and from all and singular the debts, sums of money, and demands whatsoever, which then were due and owing to them the said several creditors, parties thereto, of the third and seventh parts respectively, from the said firm or copartnership of *Easterby, Hall, and Co.* or the said *George Doubleday, Anthony Easterby, Walter Hall, and Frederick Hall*, as continuing partners, or the said *Aubone Surtees and John Surtees*, as late partners therein as aforesaid, and jointly or severally, or the said *Richard Puller the elder*, and *Richard Puller the younger*, or either of them, upon any account whatsoever, and of and from all judgments, bonds, bills of exchange, promissory notes, and other securities, made, given, or entered into, for securing the payment of the same several debts and sums of money respectively, or any of them, and also of and from all and all manner of actions, suits, and other proceedings, causes of action and suit, or other proceedings, accounts, reckonings, damages, duties, claims, and demands whatsoever, which they the said several creditors, parties hereto, of the third and seventh parts respectively, or any of them had claimed, or were en-

1820.

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Ex parte
CAUSTARS.
In the Matter
of
SLADE the el-
der & young-
er.

1820. titled to, or might or could have claim, or be entitled to, against the said firm of *Easterby, Hall, and Co.* or the said *George Doubleday, Anthony Easterby, Walter Hall, and Frederick Hall*, as continuing partners, or the said *Aubane Surtees and John Surtees*, as late partners therein, or any of them, or their or any of their joint or separate estates and effects, or any parts thereof respectively, or against the said *Richard Puller the elder*, and *Richard Puller the younger*, or either of them, for or by reason or means of the said several debts or sums of money, or any other matter, cause, or thing whatsoever, relating to the said copartnership, or the concerns thereof, antecedently to the date and execution of the said presents, subject and without prejudice nevertheless to the claims and demands of the said creditors respectively, under and by virtue of the trusts and provisions thereinbefore contained. And this indenture likewise witnessed, that the said *Thomas Maltby, Thomas How Masterman, and Samuel Brown*, assignees of the estate and effects of the said *John Ellill*, so far as they had any interest in the premises, did thereby testify their assent to, and approbation of this indenture, and the said recited indenture of assignment bearing even date therewith, and the trusts and provisions in and by the same indentures respectively contained; and in consideration thereof, they the said *Thomas Maltby, Thomas How Masterman, and Samuel Brown*, remised, released, acquitted, exonerated, and discharged the said *George Doubleday, Anthony Easterby, Walter Hall, and Frederick Hall*, and each and every of them, and their respective executors and administrators, and also the said *Richard Puller the elder*, and *Richard Puller the younger*, and each of them, and their heirs, executors, and administrators, of and from all debts, sums of

Ex parte
CARSTAIRS
In the Matter
of
SLADE the elder & younger.

money, notes, accounts, and demands whatsoever, which were then due and owing to them as assignees as aforesaid, from the said *George Doubleday, Anthony Easterby, Walter Hall, and Frederick Hall*, or any of them, or from the said *Richard Puller* the elder, and *Richard Puller* the younger, or either of them, subject nevertheless to the claims and demands of the said *Thomas Maltby, Thomas How Masterman, and Samuel Brown*, under and by virtue of the trusts and provisions thereinbefore and after contained, in the event of their being creditors of the said copartnership of *Easterby, Hall, and Co.* upon such investigation of accounts as thereinbefore alluded to, provided always, and in order the more effectually to provide for the accommodation and security of the respective creditors of *Easterby, Hall, and Co.* it was expressly agreed and declared by and between all the said parties thereto, it should be lawful to and for *Sir John Cox Hippesley, George Simson, and Arthur Mowbray*, or the trustees or trustee for the time being, to sign and deliver to all and every the said creditors, parties hereto of the second, third, seventh, and eighth parts respectively, debentures or certificates of acknowledgments for the amount of their several and respective debts, provided and secured to be paid under the said trusts and provisions thereinbefore contained, or for any part or parts of the respective debts or claims of the same several creditors respectively, which should be admitted and established to be due; such debentures to represent the respective debts or sums of money for which the same should be signed and issued, as aforesaid, to be made payable to the bearer, by and out of the respective trust funds thereby provided and established for the payment of the

1820.

Ex parte
CARSTAIRS.
In the Matter
of
SLADE the el-
der & young-
er.

1820.

—
Ex parte
 CARSTAIRS.
 In the Matter
 of
 SLADE the el-
 der & young-
 er.

said debts: and each and every of the creditors, parties thereto of the second, third, seventh, and eighth parts, did thereby for himself, his heirs, executors, or administrators, covenant to and with the said Sir *John Cox Hipplesley, George Simson, and Arthur Mowbray*, their executors, administrators, and assigns, that when, and so soon as the said presents, and the said indenture of assignment, bearing even date therewith, should have been executed by the said *George Doubleday, Anthony Easterby, Walter Hall, and Frederick Hall*, and such debentures or certificates should have been signed and issued by the said trustees, or trustee for the time being, in manner aforesaid, they the said several and respective creditors, parties thereto of the second, third, seventh, and eighth parts, or their respective executors, administrators, or copartners, should, immediately upon receiving such debentures for the amount of their respective debts, or having the same tendered to them respectively, give and deliver up into the hands of the said trustees or trustee for the time being, or of any person or persons duly authorized by them or him in that behalf, all such bills of exchange drawn, accepted, or indorsed by the said firm or copartnership of *Easterby, Hall, and Co. or Hall and Co. or by the said Richard Puller the elder and Richard Puller the younger, or by the firm of C. and R. Puller, or by the said John Ellill, or by the said Messrs. Atkinson and Mount* respectively; and all such other bills of exchange or promissory notes whatsoever, as they the several and respective creditors, parties thereto of the second, third, seventh, and eighth parts, then held or were entitled to for the several debts due and owing to them respectively, from the said copartnership

of *Easterby, Hall, and Co.* or any part of such debts respectively, save only and except those bills of exchange whereon there were the names of other persons than of the said *Easterby, Hall, and Co.* or *Hall and Co.* or *C. and R. Puller, and Atkinson and Mount, and John Ellill*, or any of them, their, or any of their clerks or agents.

1820.

Ex parte
CARSTAIRS.
In the Matter
of
SLADE the elder & younger.

Messrs. *Kensington and Co.* as creditors of *Easterby, Hall, and Co.* had executed this deed. They also proved against the estate of the *Slades* for £7957 : 9 : 5, the amount of their acceptances upon the bills drawn by *Ellill*. The assignees of the *Slades* presented a petition to have this proof expunged. The Vice Chancellor, upon hearing the composition deed of the 23d June, 1811, read — was of opinion, that, according to the true construction of the said trust deed, the said acceptances of the said *Thomas Slade*, and *Thomas Slade the younger*, must be considered as satisfied, and ought to have been delivered up; and he therefore ordered, upon the consent of the said *John Ellill's* assignees, that the proof made of the said debt of £7957 : 9 : 5, by the said *John Pooley Kensington, Edward Kensington, William Styant, and Daniel Adams*, under the said commission, be expunged from the proceedings under the said commission, and that the bills of exchange in the said petition mentioned and particularized in the said proof, be delivered up by the petitioners, to the petitioners *Sir Charles Price, Thomas How Masterman, and Joseph Garland*.

This case had been, on the two preceding days, argued at great length by the *Attorney General, Mr. Cullen*, and *Mr. Montagu*, in support of the Vice

1820.
 Ex parte
 CARSTAIRS.
 In the Matter
 of
 SLADE the el-
 der & young-
 er.

Chancellor's order; and by Mr. *Hart*, Mr. *G. Wilson*, and Mr. *Rose*, for the appellants. His Lordship now delivered the following judgment:—

The LORD CHANCELLOR.

I may perhaps save time by going through this case now, as it is very complicated and intricate, and may be open to considerable difference of opinion. Though I shall give you my opinion now, I must make this declaration, that it is without prejudice to the case being reheard, if the parties think proper. The question in this bankruptcy is, whether, by the effect of the deed of composition, or from any other circumstances, certain bills, on which is the acceptance of the *Slades*, are to be considered as satisfied. In the argument before me, there was not produced any proof that there were circumstances which, independently of the deed of composition, would amount to a discharge of *Slades*, the acceptors. But if there are any circumstances that actually furnish facts in this case, or these circumstances being suggested, it will be fit an inquiry should be made on the subject. What I am about to state, is what appears to me to be the result of this deed of composition, and of it alone. But, as I have observed, if there are any other circumstances that ought to be taken into the account, they may be made the subject of inquiry.

I have looked through the deed with very great care, and it appears to be made between *George Doubleday*, *Anthony Easterby*, *Walter Hall*, and *Frederick Hall*, merchants and copartners, trading under the firm of *Easterby, Hall, and Co.* of the first part; and which firm originally consisted of other parties; *Arthur Mowbray*, *Joseph Bulmer*, and seve-

ral other persons, the assignees of the estate and effects of *Aubone Surtees* and *John Surtees*, at that time bankrupts, of the second part; of the third part, *Arthur Mowbray*, *George Lewis Hollingsworth*, and several other gentlemen, bankers in the city of Durham; of the fourth part, *Richard Puller* the elder, and *Richard Puller* the younger, both of the city of London, merchants and copartners; the party of the fifth part was a gentleman of the name of *Robert Skelton*; the sixth, *Sir John Cox Hipplesley*, Bart. *George Simson*, and the said *Arthur Mowbray*; of the seventh part, the parties were persons thus described: —“the several persons, creditors of the said copartnership of *Easterby, Hall*, and Co. who shall by themselves, or their respective partners, attornies, or agents thereto duly authorized, execute these presents.” I read the description of these persons, because it appears to me, that this is the first, among many intimations and proofs that are to be found in the course of reading this long deed or composition, that the intention of this instrument was to pay the debts of *Easterby, Hall*, and Co. and the creditors are described as the creditors of *Easterby, Hall*, and Co. Of the eighth part, *Thomas Maltby*, *Thomas How Masterman*, and *Samuel Brown*, assignees of *John Ellill*; and it is here to be observed, that both the *Surtees* who had been partners of *Easterby, Hall*, and Co. had at that time become bankrupts; and *Ellill* was also a bankrupt.

1820.

Ex parte
CARSTAIRS,
In the Matter
of
SLADE the el-
der & young-
er.

The deed then proceeds to state, that *George Doubleday*, *Anthony Easterby*, *Walter Hall*, and *Frederick Hall*, together with the said *Aubone Surtees* and *John Surtees*, had established a partnership for working mines, and that they had become entitled

1820.

Ex parte
CARTAIRS.
 In the Matter
 of
 SLADE the el-
 der & young-
 er.

to a great variety of mining property in Durham, and in various other places, by virtue of several leases; and that, in consequence of what was necessary to enable them to carry on the mining concern, they became indebted to various persons in large sums of money, on account of that partnership of *Easterby, Hall, and Co.* and that, for the payment of the creditors of *Easterby, Hall, and Co.* of the seventh part, this deed was executed.

The deed then goes on to state, that *Easterby, Hall, and Co.* assigned five of the leases, part of the partnership property, for securing the repayment of £3000 which had been advanced to the partnership: this took place on July 10, 1802. It is not necessary to take any further notice of that transaction, but to proceed to the other transactions. On the 4th of July, 1808, the two *Surtees* became bankrupts, and by their bankruptcy, and not by contract, the partnership as between *Easterby, Hall, and Co.* and the two *Surtees*, was dissolved, and the other persons, *George Doubleday, Anthony Easterby, Walter Hall, and Frederick Hall*, still continued to carry on the business as *Easterby, Hall, and Co.* and by indenture of assignment, bearing date the 13th day of May, 1808, and made between these continuing partners and the partners of the Durham bank; which assignment contained this recital, which, as it appears to me, requires to be accurately attended to, stating—"that *Arthur Mowbray*, and the other partners of the Durham bank had advanced, for the use of *Easterby, Hall, and Co.* the continuing partners, various sums of money," that is to say, that the members of the Durham bank became creditors of *Easterby, Hall, and Co.* by virtue of their having advanced various sums of money,

by, or upon the discount of bills of exchange drawn by *Easterby, Hall, and Co.* on the several persons therein mentioned, not mentioning their names; and that they had also agreed, should the occasions of *Easterby, Hall, and Co.* require it, to discount other bills of exchange, to be drawn and accepted as therein is expressed, and in consideration of the premises, and for the other considerations therein expressed, the several undivided parts or shares of the said *George Doubleday, Anthony Easterby, Walter Hall, and Frederick Hall* of and in the several mines and hereditaments, and the parts and shares of mines and hereditaments therein particularly described; and also the entirety of various messuages, closes, lands, and hereditaments therein also described, (being part of the said leasehold mines and premises of and belonging to the said co-partnership of *Easterby, Hall, and Co.*) were, or were expressed to be assigned by these continuing partners; unto the said *Arthur Mowbray* and his partners, their executors, administrators, and assigns, for the respective residues of the several terms of years, &c. for securing the payment, liquidation, and reduction of the several sums of money theretofore advanced, or thereafter to be advanced by the said *Arthur Mowbray*, and the other partners of the Durham bank, for the use, or on the account of *Easterby, Hall, and Co.* and to be advanced for the use of *Doubleday, Easterby, Hall, and Co.* by way of discount upon other bills of exchange, with the usual interest, and with such powers and authorities in the respective events therein specified, to enter and take possession of the premises, assigned for the purposes of making good securities, as therein mentioned and contained; and subject to the said security upon trust

1820.

Ex parte
CARSTAIRS.
In the Matter
of
SLADE the cl-
der & young-
er.

1820. for the continuing partners of *Easterby, Hall, and Co.* The instrument then recites that a considerable sum of money remained due to the said *Arthur Mowbray*, and the other partners of the Durham bank, by virtue of that assignment; and it then proceeds to state that, since the bankruptcy of *Aubone Surtees* and *John Surtees*, the mining concern had been conducted by these four persons, *George Doubleday, Anthony Easterby, Walter Hall, and Frederick Hall*, under the firm of *Easterby, Hall, and Co.* without any interference therein by *Aubone Surtees* and *John Surtees*, or either of them, or their assignees, and without any final settlement of the accounts of the said partners touching the said joint concern, up to the time of the bankruptcy; and that *Doubleday Easterby, Hall, and Co.* had since expended large sums of money in the discharge of many of the subsisting debts and engagements, contracted by the co-partnership prior to that period, [that is, to the period of the *Surtees'* bankruptcy], and had, in consequence of such payments, and of the great advances necessary to be made, and which had been made by them, for carrying on the mining concern, become indebted to various persons in large sums of money, and, amongst others, to *Richard Puller* the elder, and *Richard Puller* the younger, for, and in respect of divers sums of money advanced by them, (who, you will recollect, are parties to this instrument), to, or on account, and for the accommodation of the said *George Doubleday, Anthony Easterby, Walter Hall, and Frederick Hall*, as continuing partners, as aforesaid, [that is, for money advanced by that house to the firm of *Easterby, Hall, and Co.*]. Then there is this recital, that the two *Pullers*, at the instance and request, and for the accommodation of

Ex parte
CARSTAIRS.
In the Matter
of
SLADE the el-
der & young-
er.

Easterby, Hall, and Co. did likewise become liable and engaged to many of the several persons, parties thereto, of the seventh part, being creditors of the mining concern, for the payment to them of several large sums of money; that they had become liable and engaged to persons who are described as parties of the seventh part, and they are described as creditors of *Easterby, Hall, and Co.* by drawing, accepting, or indorsing in their favor, in favor of such creditors, bills of exchange, all of which are become due; but that *Easterby, Hall, and Co.* and *Richard Puller* the elder, and *Richard Puller* the younger, are respectively at present unable to take up and discharge the same. The effect of that recital being, that the *Pullers* had become engaged to the creditors of *Easterby, Hall, and Co.* while that partnership remained, consisting of four of the original partners, but exclusive of the *Surtees*, and that the *Pullers* were unable to pay this money which had become due, and which bills were for the payment of the debts of *Easterby, Hall, and Co.* It then proceeds to state, that several creditors are respectively holders of bills of exchange, as securities for their debts owing to them by the said copartnership of *Easterby, Hall, and Co.* which are drawn by, or on, or accepted, or indorsed by *John Ellill*; and also holders of other bills of exchange drawn by, or on, or accepted, or indorsed by Messrs. *Atkinson* and *Mount*, of Broad-street Buildings, London, merchants; all of which bills are now due. And here I remark again, that all those bills that were drawn by, or on, or accepted, or indorsed by *Ellill*, and the other bills that were drawn by, or on, or accepted, or indorsed by *Atkinson* and *Mount*, and which bills are stated to be due, are here characterized as bills of exchange which are to be se-

1820.

Ex parte
CARSTAIRS.
In the Matter
of
SLADE the el-
der & young-
er.

1820. curities for the debts of this partnership of *Easterby, Hall, and Co.* of these debts which are represented as the debts due to the Durham bank, for the payment of which the *Pullers* had engaged; and those debts which are represented and secured by the paper of the *Pullers*, of *Elhill*, and of *Atkinson and Mount*, are all, and every one of them, debts of *Easterby, Hall, and Co.*

Ex parte
CARSTAIRS.
In the Matter
of
SLADE the elder & young-
cr.

It then states that a commission of bankrupt had issued against *John Elhill*, and that the account current between *John Elhill* and the copartnership of *Easterby, Hall, and Co.* had not been made up and settled, and it was then uncertain in whose favor the balance of such account would appear upon the final settlement thereof; but, in consideration of the provisions thereafter contained, for the discharge of the debts of *Easterby, Hall, and Co. &c.* Here again the debts are represented as the debts of this copartnership, and secured by the said bills of exchange, drawn, accepted, or indorsed by the said *John Elhill*. Now the said bills of exchange which are mentioned to be in the hands of the creditors of *Easterby, Hall, and Co.* are a security for the debts due to them, and not by any body else—The assignees of *Elhill* had, with the consent of his creditors for that purpose, agreed to accept payment of such sums of money, if any, as should or might appear to be due to his estate upon the balance of the last mentioned accounts, in the order and course, and pursuant to the trusts and directions thereafter expressed and contained.

Then there is in this instrument an agreement with the assignees of the *Surtees*, to accept the sum of £10,800, in lieu and satisfaction of the shares and in-

terests of the said bankrupts, and of the said assignees, in right of the bankrupts, of and in the said leasehold premises, and of and in all other the real and personal estates of or belonging to the said *George Doubleday, Anthony Easterby, Walter Hall, and Frederick Hall*, and the said *Aubone Surtees* and *John Surtees*, as copartners, as aforesaid; which said sum of £10,800 is to be considered as a debt due from *Easterby, Hall, and Co.* to the assignees of the said bankrupts, parties thereto of the second part, and to be paid to them as thereafter mentioned; and the said assignees had been further empowered, and it had been further agreed, that they should come in and take a dividend in respect of any balance which might be due to them as assignees of Messrs. *Surtees, Burdon, and Co.* from the said copartnership of *Easterby, Hall, and Co.* rateably, and in the order with the other creditors of the said copartnership, parties thereto of the seventh part. The result of the agreement is this, that without settling the accounts between the partnership of the six, the assignees of the two *Surtees* might sell any interest in the tangible property they might have for this £10,800; and if there was any balance, these assignees were to come in as creditors for that balance: but here we may observe, unless we govern ourselves by the terms of a written instrument, where are we to go, or where to stop; for these two *Surtees* being liable unquestionably to *Easterby, Hall, and Co.* up to the time when they became bankrupts, when there was an enormous debt on this concern, it is a remarkable fact, that in this deed there is no provision as to what is to be done between the creditors holding the securities of the *Surtees*, or either of them, for the debts of that partnership, which are totally left out of the question;

1820.

Ex parte
CANSTAIRS.
In the Matter
of
SLADE the el-
der & young-
er.

1820.
Ex parte
CARSTAIRS.
 In the Matter
 of
 SLADE the el-
 der & young-
 er.

and the deed proceeds on a calculation that this concern will work its way, and that these mines were worth £330,000. Instead of containing the liability of the two *Surtees*, or their assignees, they are totally left out of the question, except as to the interest to be purchased at £10,800. And that was an arrangement that might do very well among the parties arranging, but there are no facts at all in this deed which refer to the securities of the *Surtees*, and the future provisions do not touch them.

The deed then further states, that it had been agreed between *Doubleday, Easterby, Hall, and Co.* the four continuing partners, to dissolve this partnership of *Easterby, Hall, and Co.* and it had been agreed between that copartnership of *Easterby, Hall, and Co.* with the consent of the assignees of the *Surtees*, and with a view to make a provision for the payment of the debts of the said copartnership, (no other debts are mentioned), and to wind up and finally settle the concerns of the said copartnership, that the mines and the other leasehold premises thereafter mentioned, subject to the rents and covenants payable and to be performed in respect thereof; and also to the said mortgage of £3000, and all the engines, machinery, &c. &c. shall be sold.

The deed then proceeds to state another deed of even date, and made between the said *Arthur Mowbray, George Lewis Hollingsworth*, and other members of the Durham bank, of the first part; the said *Arthur Mowbray, Joseph Bulmer*, and others, the assignees of the *Surtees*, of the second part; *Easterby, Hall, and Co.* of the third part; *Walter Hall and Frederick Hall, Richard Puller the elder, Richard Pul-*

ler the younger, and *Robert Skelton*, of the fourth part; and certain persons in the said indenture now in recital particularly named and described, of the fifth part, but whose names do not appear; and the said *Sir John Cox Hipplesley*, *George Simson*, and *Arthur Mowbray*, of the sixth part; reciting the agreement thereinbefore recited, to dissolve the copartnership between *Easterby, Hall*, and Co. as consisting of the four continuing partners, after the partnership had been dissolved as between them and the two *Surtees* by the *Surtees* becoming bankrupts; and that, in consequence of such determination, the said parties thereto, of the fourth and fifth parts, had agreed to purchase the mines and other leasehold premises belonging to the copartnership, and thereafter expressed to be assigned, subject to the mortgage of £3000; and also all the engines, machinery, &c. &c. except lead, lead ore, and booze, raised by the said copartnership of *Easterby, Hall*, and Co. for the sum of £330,000; and reciting, that in order to facilitate and secure all such debts as were or might be due from the copartnership of *Easterby, Hall*, and Co. and in order to satisfy such other claims and demands, if any, which might be made and established upon or against the said copartnership, or either of them;—these acceptances of *Slade*, and these bills of *John Ellill*, in the hands of the *Kensingtons*, not being debts due from the partnership of *Easterby, Hall*, and Co. whose names were not on those bills,—and with a view to an arrangement then already made between the said parties thereto of the third part, as to the disposition of the ultimate surplus of the said purchase-money, it had been agreed between the four continuing partners of *Easterby, Hall*, and Co. with the consent of the assignees, par-

1820.

Ex parte
CARSTAIRS.
In the Matter
of
SLADE the elder & younger.

1820. ties thereto of the first part; and of the mortgagees, parties thereto, that is the Durham bank, of the second part; that the purchase-money, or sum of £330,000, should be paid in manner thereafter mentioned, and be secured to be paid to, and should be received by the said parties thereto of the sixth part, as trustees, in order that the same might be applied by them for those purposes accordingly, that is, for the payment of the debts of *Easterby, Hall, and Co.* but so that, in the application of such monies, the respective parties thereto of the fourth and fifth parts, in their capacities of purchasers, or those who should or might claim through or under them respectively, should not be concerned, nor in any wise affected.

Ex parte
CARSTAIRS.
 In the Matter
 of
 SLADE the el-
 der & young-
 er.

It is not very material to state that which is to be found in the six or seven pages that follow in the recitals I have been reading, because they only affect an agreement by which purchasers of certain shares, the mines being divided into fifty parts, were to advance money by instalments, and how the purchasers of other shares were to pay their part, and how the respective monies were to be applied according to the terms therein stated, in the payment of the debts of *Easterby, Hall, and Co.* in payment of a sum of money amounting to £15,000, in payment of £10,800, and likewise in payment of certain dividends; and there are other covenants for the payment of the money according to all these purposes. And it then recites that of which I have no doubt, that they then were of opinion that these sums would be an ample provision for the payment of the debts of *Easterby, Hall, and Co.* with the exception of the *Pullers*, which debts they agreed to relinquish; so that the debts

proposed to be paid are the debts of *Easterby, Hall, and Co.* and their debts only. And then comes this clause, which is a very material one.—“ And further, that, as well the debts and sums of money due and owing to the said copartnership of *Easterby, Hall, and Co.* and intended to be thereby assigned; as also the clear yearly income, rents, and profits of or to arise from the said 23-50th shares of and in the said mines and premises comprised in the said indenture bearing even date herewith, and of and in the said working capital of £70,000, after payment of the annuities of £500 and £500, respectively, as aforesaid, shall be applicable to the reduction, and complete satisfaction and discharge of such debts and sums of money due and owing from the said copartnership of *Easterby, Hall, and Co.* as shall from the time being, remain unsatisfied, including the debt, (if any), which may appear to be due to the estate of *John Ellill*, upon the balance of account, as aforesaid, he then being a bankrupt; and also including the residue of a sum of £15,000 to be paid to the said *George Doubleday* and *Anthony Easterby*, as aforesaid, (the two retiring partners); but nevertheless, that the several provisions so proposed to be made, are respectively intended to be, and shall be accepted and taken — by whom? — by the several and respective creditors of the said copartnership, in full satisfaction and discharge—of what? of their respective debts and demands, as well against the said *George Doubleday, Anthony Easterby, Walter Hall, and Frederick Hall*, respectively, as against the said *Richard Puller* the elder, and *Richard Puller* the younger, or against the estate of the said *John Ellill*, or against the said Messrs. *Atkinson and Mount*, respectively.” And to be sure, if it had stop-

1820.

Ex parte
CARSTAIRS.
In the Matter
of
SLADE the el-
der & young-
er.

1820.

Ex parte
CARRISTAIRS.
 In the Matter
 of
 SLADE the el-
 der & young-
 er.

ped there, then the provision made by this deed would have been different from what it is. But it goes on—"In respect of the said bills of exchange, drawn, accepted, or indorsed by them or any of them respectively, and now remaining over due, with the names of the said *Easterby, Hall, and Co.* or *Hall and Co.* thereon; all of which bills of exchange are to be delivered up by the respective holders thereof to be cancelled, upon receiving debentures under the hands of the trustees of the said trust funds, for the amount of their respective debts, payable to the bearer, pursuant to the proviso hereinafter contained. Now, what are the debts? In respect of what debts were these persons to be discharged? In respect of the said bills of exchange—What are these said bills of exchange? The said bills of exchange which had been drawn, accepted, or indorsed by those persons who are the sureties for the debts of *Easterby, Hall, and Co.* You see, therefore, they are to be discharged of bills of exchange of a particular character; but how can you discharge bills of exchange that do not bear that particular character? And it does not stop there—"but nothing therein contained is intended to operate as a release and discharge to any other person or persons save only and except the said *George Doubleday, Anthony Easterby, Walter Hall, and Frederick Hall, Richard Puller the elder, and Richard Puller the younger, and the said Messrs. Atkinson and Mount, and the estate of the said John Ellill.* Now suppose these bills of exchange had not been qualified by the former part of this clause, by the title which shews what bills are meant, still, I conceive, it is now perfectly clear, that, by a deed of composition, where you wish to release certain individuals, but to retain the liability of other individuals, you may retain

that liability, if those with whom you contracted are willing to enter into that sort of composition. The question was put—How can I deliver up these bills to be cancelled, without discharging other persons than you? The question on this clause is—What was the true intent and meaning of the parties in using these words—“to deliver up the bills?” The bills were not ostensibly to be delivered up, but they were to be so modified, and so managed, that, though some persons were to be discharged, yet others were not to be discharged. And, therefore, that delivery up of those bills of exchange must be so modified in favor of those who have a right to protect themselves, with a view to have the benefit of the reservation.

1880.

Ex parte
CARSTAIRS.
In the Matter
of
SLADE the el-
der & young-
er.

Then it goes on—“And whereas, in order to facilitate and promote the said intended arrangements, and as a further consideration and inducement for the other creditors”—of what other creditors? “of the said partnership of *Easterby, Hall, and Co.*” And there are words again qualifying the nature of that discharge, and they agree to do so and so. There are then a great variety of operative parts of this deed, and others relating to the firm or partnership of *Easterby, Hall, and Co.* and then the deed contains powers of attorney; and other parts are thrown in, to enable the trustees to act in a particular way: and there are other clauses which are not at all necessary to be attended to in deciding this case.

The next material part of this deed is this: “Provided nevertheless, and it is expressly agreed and declared between and by the said parties to these presents, that the several trusts and provisions thereinbefore contained, for payment of the debts of the

1820.

Ex parte
CARRTAINS.
 In the Matter
 of
 SLADE the el-
 der & young-
 er.

said firm or copartnership of *Easterby, Hall, and Co.* are to be forthwith accepted and taken by the several and respective creditors thereof, in full satisfaction and discharge of their respective debts and demands; and that, in case any one or more of the creditors for the time being of the said firm or copartnership of *Easterby, Hall, and Co.* or of the said *George Doubleday, Anthony Easterby, Walter Hall, and Frederick Hall*, as continuing partners therein as aforesaid, shall, upon request for that purpose made by the said trustees or trustee for the time being, neglect, decline or refuse to execute these presents; or if any such creditor or creditors, having notice of the trusts and provisions herein contained, shall commence, prosecute, continue, or carry on any action or actions, suit or suits, or other proceedings whatsoever, either at law or equity, for the recovering of all or any part of the debt or respective debts due and owing to the same creditor or creditors respectively, either against the person or effects of them the said *George Doubleday, Anthony Easterby, Walter Hall, and Frederick Hall*, or any of them, their, or any of their heirs, executors, or administrators, or against the said *Richard Puller* the elder, and *Richard Puller* the younger, or either of them, their, or either of their executors or administrators, or the estate of the said *John Elhill*, then, or in any of these cases, the creditor or creditors so neglecting, refusing, or declining to execute these presents, or commencing or continuing any such action, suit, or other proceedings, after notice thereof as aforesaid, and his, her, and their respective executors and administrators shall be wholly excluded and debarred from taking any benefit under the trusts and provisions hereinbefore contained, or any

of them; and the dividend which they would have taken shall be retained by the trustees for the time being, and invested from time to time in their names in or upon government securities, and shall constitute a fund for indemnifying and reimbursing the several and respective persons liable or responsible to or for the payment of the debts upon which such dividend or dividends shall be made, and their respective estates and effects for and in respect of all such sum and sums of money, loss, costs, charges, and expenses, as they shall pay, suffer, or sustain. And then the mortgagees of *Easterby, Hall, and Co.* and other persons, of the seventh part, being creditors of *Easterby, Hall, and Co.* release *George Doubleday, Anthony Easterby, Walter Hall, and Frederick Hall*, and also the said *Richard Puller* the elder, and *Richard Puller* the younger. *John Ellill* being a bankrupt, they do not release him or his estate: whether that was a mistake or not I cannot tell. They release them of and from all and singular the debts, sums of money, and demands whatever, which now are due and owing to them the said creditors, parties thereto, of the third and seventh parts respectively, from the said firm or copartnership of *Easterby, Hall, and Co.* or the said *George Doubleday, Anthony Easterby, Walter Hall, and Frederick Hall*, as continuing partners, or the said *Aubone Surtees* and *John Surtees*, as late partners therein as aforesaid." They do release, (but not the estate of *Ellill*) "jointly and severally, the said *Richard Puller* the elder, and *Richard Puller* the younger, or either of them, of and from all judgments, bonds, bills of exchange, promissory notes, and other securities, made, given, or entered into, for securing the payment of the said several debts, &c. which they might be entitled to, against the firm or copartnership

1820.

Ex parte
CARSTAIRS,
In the Matter
of
SLADE the el-
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1820.

Ex parte
Carstairs.
 In the Matter
 of
 SLADE the el-
 der & young-
 er.

of *Busterby, Hall, and Co.* as the continuing partners, or the said *Aubone Surtees and John Surtees*, as late partners therein, or any of them, or their or any of their joint or separate estates and effects, or any part thereof respectively, or against the said *Richard Puller the elder*, and *Richard Puller the younger*, or either of them, for or by reason or means of the said several debts or sums of money, or any other matter, cause, or thing whatsoever, relating to the said copartnership, or the concerns thereof, antecedently to the date and execution of these presents; subject and without prejudice nevertheless to the claims and demands of the said creditors respectively, under and by virtue of the trusts and provisions hereinbefore contained." Now this proviso certainly contains very general words; but the question is, looking at the creditors, whose object was the payment of the debts of this partnership of *Busterby, Hall, and Co.* and looking at the whole context of this deed, whether these bills that related to the partnership of *Busterby, Hall, and Co.* were to be discharged; and whether these qualifying words would not authorize the court to say, that if there are any other demands not relating to that partnership, it is not the intent of this deed that they should be discharged. I mean any other demands that had no relation to the debts of that partnership.

They then go on to state, "that *Thomas Malby*, and the other assignees of the estate and effects of the said *John Elhill*, so far as they have any interest in the premises, do hereby testify their assent to, and approbation of this present indenture, and the said recited indenture of assignment." And this puts out of the question what Mr. *Montagu* stated in his argu-

ment, that the assignees of *Ellill* did not know what was done under this deed. But there is this principle, which must be laid down in this case, that every body interested, who has signed this deed, must be supposed to understand the true intent and meaning of it. The assignees of *Ellill* who signed this deed, as his deed, and who represent him, must be supposed to understand the legal effect of the deed. Nobody that signed the deed can be permitted to say, in this court, that he was ignorant of its legal effect. As Mr. *Ellill* himself could not pretend such ignorance, so neither could his assignees: but they must be supposed, on their part, to intend to act conformably to what was the legal operation of this deed.

1820.

Ex parte
Carstairs,
In the Matter
of
Slade the el-
der & young-
er.

And then the clause about the debentures follows: "they are to give and deliver up into the hands of the said trustees or trustee for the time being, or any person or persons duly authorized by them or him in that behalf, all such bills of exchange — [not all bills of exchange — but all such bills of exchange,] drawn, accepted, or indorsed by the said firm or copartnership of *Easterby, Hall, and Co.* or *Hall and Co.* or by the said *Richard Puller* the elder and *Richard Puller* the younger, or by the firm of *C. and R. Puller*, or by the said *John Ellill*, or by the said Messrs. *Atkinson and Mount*, respectively, and all such other bills of exchange, or promissory notes whatsoever, as they the several respective creditors, parties hereto of the second, third, seventh, and eighth parts, now hold, or are entitled to, for the several debts due and owing to them respectively, from the said copartnership of *Easterby, Hall, and Co.* or of any such debts respectively." Now, you observe what bills are to be delivered up — such bills of exchange — that is, the

1820.

Ex parte
CARSTAIRS.
 In the Matter
 of
 SLADE the el-
 der & young-
 er.

bills of exchange before recited, and before described, which they, the several and respective creditors, now hold, or are entitled to, for the several debts due and owing to them respectively from the said co-partnership of *Easterby, Hall, and Co.* These words, then, connect themselves with "all such bills," and the words, "other bills;" and it is impossible the proviso I have read should have a connection with debts that were not debts due and owing from the partnership, in respect of which these persons were liable; because, if there had been no qualifying words in that proviso, and if the release was intended to apply with respect to every debt in which *Easterby, Hall, and Co.* as individuals, had been concerned—not in which the *Pullers* had become engaged—not that in respect of which the partnership of *Atkinson and Mount* had become engaged—the delivery that would have been required would have been a delivery up of all bills and promissory notes due from them, or any of them, whether in partnership or otherwise. But that is not so: but the bills which are to be delivered up are qualified, and mean those bills that were described in the former part of this deed, bills which were drawn, accepted, or indorsed on account of the partnership debts. And if that should not be satisfactory, the words are added: "all bills and promissory notes," which words "promissory notes," are not to be found in the first part of this deed. All promissory notes or bills of exchange that were due from the partnership of *Easterby, Hall, and Co.* And then follow these words "save only and except those bills of exchange whereon there are the names of other persons than of the said *Easterby, Hall, and Co.* or *Hall and Co.* or *C. and R. Puller,* and *Atkinson and Mount,* and *John Edill,* or any of

them, their, or any of their clerks or agents." Then the first question here is—Are these bills of *Slade* in the hands of the *Kensingtons*? Are they bills for debts due and owing to them respectively from the copartnership of *Easterby, Hall, and Co*? They are not—they are not such bills as are described in the former part of this deed. As they do not fall within even the description of the bills that were to be delivered up, does not the question come to this—What they have engaged or have not engaged to deliver up by executing this instrument? I am of opinion, they meant to discharge all debts due on account of this partnership, whether they were debts by *Easterby, Hall, and Co.* or *Hall, and Co.* Have they or have they not, by this deed, released any bills of exchange, in respect of any debts but those of *Easterby, Hall, and Co.*? I think they have not. To put it in another way—If they did mean to discharge any other debts, it must be by some other means, and not by any of the clauses or provisions of this deed. This deed, in my judgment, meant to discharge the debts of *Easterby, Hall, and Co.* in reference to this mining concern. It proceeds upon calculations (which I hope will turn out to be on a better foundation, and to have been better attended to, than some founded on other calculations) that would be sufficient to pay every body who had any demands on the mining concern, because the creditors seem to me to have had the caution to say—should you mean any thing more than to discharge the debts of the mining concern, we beg to have a reservation against names which are other names than those of *Easterby, Hall, and Co.* as acceptors, in our possession. And then the question is, was it not competent for them to make that bargain, and for the other party to accept of it? My opinion

1820.

Ex parte
CARRUTHERS.
In the Matter
of
SLADE the el-
der & young-
er.

1820. is, that it was competent for the parties to make the bargain they have entered into, and therefore I can see nothing to prevent the assignees of the *Kensingtons* from taking the benefit of those acceptances of *Slade*, unless there are other circumstances that belong to the transaction: and if there are, they must be made the subject of inquiry.

I have most carefully and laboriously looked through this deed of composition, but it is so multifarious, that, in considering the effect of such an instrument, one may be liable to mistakes; and therefore, if any body is desirous of a rehearing — If I have mistaken the effect of any part of this deed, though I have looked at every part of it with the most minute attention, I shall be ready to hear any observations that can be made.

The Vice Chancellor's order reversed

DIGESTED INDEX

THE CASES IN THIS VOLUME,

AND TO

THE CONTEMPORARY CASES

DECIDED IN THE OTHER COURTS.

ABATEMENT.

1. By the bankruptcy of the plaintiff the suit becomes defective, if not abated by analogy to law. The assignees ordered to be made parties in a limited time, or the bill to be dismissed: whether with costs. *Qu. Randall v. Mumford*, 18 Ves. 424.

ACCEPTANCE.

See *Lease*, 8.

ACCOMMODATION BILLS.

See *Bills of Exchange*, 10.

ACCOUNT.

See *Estate*, 1, 2.

ACT OF BANKRUPTCY.

See *Fraudulent Deed*, 1.

Commission, 7, 8.

Evidence, 7, 21.

Power, 1.

1. A assigns all his estate to trustees for the benefit of his cre-

ACT OF BANKRUPTCY.

ditors; and B also makes a like assignment to trustees, two of whom are trustees under A's assignment. A, at the instance of his trustees, sues out a commission of bankrupt against B, the act relied upon being B's assignment. Held, that the commission being that of A's trustees, who were privies and parties to B's deed of assignment, could not be supported. *Ex parte Kilner re Kilner*, 1 Buck, C. B. 104.

2. A, B, and C, are traders; they employ an attorney, who is likewise employed by D, a creditor of their firm, and who afterwards becomes petitioning creditor under a commission of bankrupt issued against them. The attorney advises A, B, and C to become bankrupts, and in order to procure an act of bankruptcy, he takes D with him to the respective houses of A, B, and C, having first concerted

ACT OF BANKRUPTCY.

with them, that they should respectively deny themselves when D called. Held, that although D was not privy to such denial, yet, inasmuch as the attorney was the agent of D, as well as of A, B, and C, and accompanied him for the purpose of procuring such denials, that such denials therefore were fraudulent acts of bankruptcy, and could not support a commission on which D stood as the petitioning creditor. *Prosser v. Smith*, 1 *Holt, N. P. Rep.* 442.

3. Act of bankruptcy on parol evidence of a deed, which cannot be produced. *Ex parte Cawkwell*, 19 *Ves.* 234.

4. The bankrupt lay in prison two months on a civil process, after a criminal process had been discharged, and the discharge had been delivered to his attorney. Held, that this lying in prison constituted an act of bankruptcy, though it did not appear that the bankrupt had personal notice of the discharge. *The King v. Page*, 1 *Brod. and Bing.* 308.

5. A bankrupt after an act of bankruptcy contracts with a factor, to whom he had delivered goods for sale, and who has accepted a bill upon the strength of the goods, to return the bill if he will return the goods, and does return the bill, the assignees may adopt this contract and recover against the factor, for the nondelivery of the goods. *Butler v. Carver*, 2 *Starkie*, 483.

6. A trader being informed by the attorney of his petitioning creditors, that he has delivered a

warrant to arrest him to a sheriff's officer, who is seeking him for the purpose of executing it; and is advised by the same attorney to repair to his office to avoid the publicity of being arrested in the street, which he does, and remains there a considerable time. Held, not to have committed an act of bankruptcy within the meaning of the statutes, so as to defeat an action against the sheriff by a judgment creditor, to recover the proceeds of his goods taken and sold under a *fiery facias* sued out since the supposed act of bankruptcy. *Mills v. Elton*, 3 *Price*, 142.

7. Two traders in partnership left their shop; and told their shopman that they were going out to endeavour to get some bills of exchange discounted, and directed him to say that they were not in the way, or to make some excuse for them, in case a creditor should call. On that and the following day a creditor called, when they were both at home, and desired to see either the one or the other of them; when the shopman denied them, without being authorized by them so to do. Held, that the jury were warranted in concluding that they absented themselves with an intent to delay their creditors. *Capper v. Desanges*, 3 *Moore*, 4.

8. Where the sheriff took possession under a *fiery facias*, and at a later hour of the same day the defendant surrendered in discharge of his bail, and afterwards lay in prison two months, and thereby committed an act of

ACT OF BANKRUPTCY.

bankruptcy; and by the statute of James was a bankrupt from the time of his arrest. Held, that in an action by his assignees to recover the value of such goods, the court would notice the fraction of a day; and therefore, that the sheriff having entered before the bankrupt had surrendered in discharge of his bail, the assignees were not entitled to recover. *Thomas* and another against Sir *Francis Desanges*, Knt. 2 *Barn.* and *Ald.* 586.

9. A news-vender, who frequented the Royal Exchange for the purpose of collecting intelligence for a newspaper, appointed a creditor to meet him on the Royal Exchange, and afterwards directed a friend, if the creditor inquired there for him, to say he was not there. Held, that this was an "otherwise absenting himself," which constituted an act of bankruptcy within the statute 1 *Jac.* I. c. 15, s. 2.

So where he saw a creditor at the theatre, and secreted himself under the stage for the purpose of avoiding him. *Gillingham v. Laing*, 6 *Taunt.* 532.

10. Where a trader made a fraudulent assignment of his tavern and stock, accompanied with possession, and changed his residence from Westminster to Paddington, and a commission of bankrupt having issued against him, the assignee brought trespass against the messenger for taking possession of the tavern and goods. Held, 1. That however fraudulent the deed as against creditors, yet unless an act of bankruptcy was proved to sus-

tain the commission, the assignee might recover on her possession.

2. That it ought to be left to a jury whether the trader's change of residence was a departing from his dwelling-house with intent to delay his creditors. *Young v. Wright*, 6 *Taunt.* 540.

11. Where a trader, one of two partners, conveyed to trustees, not his creditors, all his freehold, leasehold, and copyhold, but not his personal property, (which formed but a small part of the whole), in trust, by sale, mortgage, or other disposition thereof, to raise money, whereby the trader might be enabled to facilitate a settlement with his creditors, (the pecuniary assets of the firm not being sufficient to cover the pecuniary engagements of the firm), and also gave to other persons, not creditors, a power of attorney, enabling them in the fullest manner to act for him in this settlement; and afterwards prepared a deed for the purpose of conveying all his above-mentioned landed property to two other trustees, with a view to raise £170,000 in negotiable bills, and to indemnify the drawers of those bills; but nothing was ever done under this latter deed. Held, that these circumstances did not constitute an act of bankruptcy. *Berney v. Davison*, 1 *Brod.* and *Bing.* 408.

12. The transfer of a trader's property, under circumstances similar to those stated in the case of *Berney v. Davison*, is no act of bankruptcy, notwithstanding a difference from that case in the following particulars:—1. No mention of the trader's personal pro-

ACTION.

party, 2. No statement that the trustees to the transfer were not creditors of the trader. 3. No mention of the trader's motive. 4. No mention of the abstract of the unexecuted deed furnished to the purchaser. 5. An additional statement, that on or about the time of the execution of the transfer, the trader was insolvent, and stopped payment. *Berney v. Kynner, 1 Brod. and Bing, 482.*

3. A person lay in prison two months for debt, subsequently to a criminal process which had been discharged. Held, that this constituted an act of bankruptcy, though it did not appear that he had personal notice of his discharge. *The King v. Page, 3 Moore, 656.*

ACTION.

See *Partners*. 1.
Bills of Exchange. 2, 13.
Assignment. 1.
Assignee. 12, 13.
Certificate. 20.
Commission. 11.
Election. 3.
Evidence. 4.
Fraudulent conveyance. 1.
Petitioning creditor. 6.
Arrest. 3.

1. A servant may be charged as trover, although the act of conversion be done by him for the benefit of his master. *Stephens and others, assignees of Spencer v. Ethwall, 4. Maule and Sel, 259.*

2. A, in London, orders goods of B, at Manchester; B forwards them by a carrier to London. Whilst they are on the transit, B

hears of A's insolvency, and directs the carrier to stop them, and for this purpose he makes out a new invoice to D, which he transmits to the office of the carrier in London. The goods by a mistake of the carrier are delivered to A, who becomes bankrupt; his assignees claim to retain them. Held, that B had a right to recover them in an action of trover against the assignees of A. *Litt. v. Coupley, 1 Holt N. P. Rep. 338.*

3. If in an action by the assignees of a bankrupt it is proved that an act of bankruptcy was committed before the commission issued, it will be sufficient, although the act was committed so recently before the commission, and at such a distance from London that no knowledge of it could have reached London at the time when the commission was issued out. *Hopper and others, assignees of Monbray and others, and Mason and others v. Richmond, 1 Starkie, N. P. Rep. 507.*

4. A delivers goods to a carrier to be conveyed to B; while they are in transitu, A gives notice not to deliver them, but by the mistake of the carrier they are delivered to B, who disposes of part of them, and soon afterwards becomes bankrupt. Held, that the delivery to B was incomplete, and therefore that A was entitled to recover in an action of trover against the assignees. *Litt. v. Coupley, 2 Marsh, 457.*

5. In an action by the assignees of a bankrupt for a rescue, the plaintiffs were permitted, after

ACTION.

two terms, to amend the declaration, which stated the wrong to be done to themselves, by stating the wrong to be done to the provisional assignees. *Freen v. Cooper*, 6 Taunt. 358.

6. Whether the assignees of a bankrupt can sue in tort for a tort committed against the estate of the provisional assignees. *Quere. Freen v. Cooper*, 6 Taunt. 358.

27. An uncertified bankrupt hires a shop; goods are supplied in the name of his son, but principally upon the father's guarantee. Held, that his assignees were liable to an action of trespass to the suit of his son, for seizing them as the goods of the bankrupt. *Davis v. Living*, 1 *Notes, N. P. Rep.* 275.

8. A, after committing an act of bankruptcy, in order to procure his discharge from an arrest at the suit of B, draws and indorses to B a bill of Exchange, which C accepts, in expectation of receiving goods of A's into his hands. C receives the goods, sells them, and pays the amount of the bill to B. The assignees of A cannot maintain an action against B for this money, as money had and received to their use. *Walter* and another, assignees of *Smith v. Drakeford*, 1 *Starkie, M. P. Rep.* 481.

9. Money paid in consideration of putting off the trial of a party upon an indictment for perjury, for which he is not prepared, cannot be recovered by his assignees, after he has become a bankrupt, from the prosecutors. *Harvey v. Morgan*, 2 *Starkie*, 17.

10. Two parcels of goods were

sold at different times, and paid for by bills; the vendee afterwards becoming bankrupt; the vendors proved under the commission for the amount of the first parcel, they then holding the bill given in payment for the same, the bill for the other parcel having been negotiated by them prior to the bankruptcy, and being then outstanding, was afterwards dishonored. Held, that the vendors were not precluded by the statute 49 Geo. III. c. 121. s. 14. from suing the bankrupt for the amount of the last parcel of goods. *Watson v. Meder*, 1 *Seton and Barne*, 121.

11. The house of the plaintiff, an uncertified bankrupt, was broken open, and effects acquired by him subsequently to his bankruptcy, taken by the defendants, who had become his creditors since the bankruptcy, and did not know who were the assignees under the bankruptcy. The bankrupt having sued the defendants in trespass, they obtained, after a rule for plea, a surrender of the assignees' interest in the effects seized. Held, that this was a ratification of the seizure, and that the plaintiff could not recover. *Hull v. Pickersgill*, 1 *Brod. and Bing.* 282.

12. An action of trespass *quære clausum fregit*, is maintainable by a tenant from year to year, who had become bankrupt after the committing of the trespass, and before the commencement of the suit; and the right of such action does not pass to the assignees by the assignment, unless they interfere, as the bankrupt

ACTION.

may sue as a trustee for, and has a good title against all persons but them: *Clark v. Calvert*, 3 *Moore*, 96.

13. If the plaintiffs, as assignees of a bankrupt, prove the petitioning creditor's debt, trading, and act of bankruptcy, at the trial, pursuant to notice by the defendant so to do, and are afterwards nonsuited, they are not entitled to costs under 49 Geo. III. c. 121. s. 10. as that clause relates only to cases where they obtain a verdict. *Atkins v. Seward*, 3 *Moore*, 601.

14. Certain policies of insurance belonging to A had been deposited by him as a security for a debt of £800 at a banker's; B, who was acquainted with these circumstances, afterwards, at the desire of A, expressly undertook to take the policies, and to settle with H. W. and to pay in the amount which he might receive at the banker's to A's account there. Upon this undertaking, the policies were given to him, and upon them he received the sum of £949. A having become bankrupt, and being then indebted to B in a larger sum, the latter refused to pay over the money so received. Held, that the assignee of A could not, (even with the assent of the banker), maintain any action against B for the breach of his undertaking. *Chalmers v. Page*, 3 *Barn.* and *Ald.* 697.

15. The court will discharge a rule obtained by a defendant to change the venue, in an action against him by the assignees of a bankrupt, on the usual affidavit that the cause of action arose in

ADOPTION.

another county, and that his witnesses reside there, the plaintiff swearing that the cause of action arose in a third county, and that his witnesses reside at a very considerable distance from the county to which the venue is sought to be removed, and undertaking to give evidence in the original or the third county, and that although the defendant have agreed to admit every fact establishing the bankruptcy, except the petitioning creditor's debt. *Bowden v. Glasson*, 5 *Price*, 359.

ADOPTION.

See *Act of Bankruptcy*, 5.

ADMINISTRATION.

See *Order and Disposition*, 12.

AFFIDAVIT.

See *Commission*, 4.

Practice, 1, 3, 14.

Docket, 2, 3.

Petition, 17.

Issue, 4.

Bail, 1, 2.

1. An affidavit in support of a petition to stay a certificate filed after the petition is presented, cannot be read. *Ex parte Dodson re Greenwood*, 1 *Buck*, C. B. 178.

2. The court will not order an inquiry upon an affidavit that merely states general hearsay information and belief, unless the case be pregnant with circumstances of suspicion. *Ex parte Coles re Coles*, 1 *Buck*, C. B. 244.

3. Affidavits in reply are only to be permitted in cases where

AFFIDAVIT.

new matter is introduced in the affidavits answering the petition. *Ex parte Shayle re Shayle*, 1 *Buck*, C. B. 244.

4. Affidavits that merely state hearsay and belief as to a commission being concerted, are not alone sufficient to induce the court to direct an issue; but if they are corroborated by circumstances of suspicion attending the case, an issue will be directed. *Ex parte Boyle re Warrington*, 1 *Buck*, C. B. 247.

5. Affidavit sworn before the petition is answered, cannot be read. *Ex parte Parks re Price*, 1 *Buck*, C. B. 332.

6. Where affidavits in support of a petition are irregularly filed, a respondent answering them does not waive the objection to their being read, if he have not notice of the irregularity. *Ex parte Smith re Dannek*, 1 *Buck*, C. B. 395.

7. If a respondent, knowing that the affidavits in support of the petition are filed after the petition day, answer them, he thereby waives the objection to the irregularity. *Ex parte Bury re Mather*, 1 *Buck*, C. B. 393.

8. Affidavits in support of the petition, filed after the petition day, cannot be read. In such a case the petition was permitted to stand over till the next day of petitions, that the respondent might answer the affidavits, the petitioner paying the costs of the day. *Ex parte Peel re French*, 1 *Buck*, C. B. 394.

9. An office copy is the only evidence the court will admit of the filing of the affidavit. *Ex*

AGENT.

parte North re Coleman, 1 *Buck*, C. B. 396.

10. Where respondents are too late in filing their affidavits, the court will let the petition stand over, to give the petitioner an opportunity of replying to them, the respondents paying the costs of the day. *Ex parte the Corporation of Doncaster re Wright*, 1 *Buck*, C. B. 463.

11. If, upon a petition to stay a certificate, the bankrupt do not file his affidavits in answer till after the petition day, the petitioner is entitled to have the petition stand over, that he may have an opportunity of replying to any new matter in the bankrupt's affidavits. *Ex parte Radcliffe re Gunton*, 1 *Buck*, C. B. 480.

AGENT.

See Principal and Agent.

AGREEMENT.

1. Agreement on dissolution of partnership, that the continuing partner shall, in consideration of an assignment to him of the partnership property, including a lease of the premises on which the business was carried on, secure to the retiring partner the payment of an annuity by bond, conditioned to be void on payment of the annuity, "or
" in case he should at any time
" after the expiration of the then
" existing lease be dispossessed
" of and compelled to quit the
" premises, without any collusion, contrivance, act, or default
" of his own." The continuing

AGREEMENT.

partner obtains a renewal of the lease, and afterwards becomes bankrupt, and the renewed lease passes under the assignment of his estate. This is not such an eviction or dispossession as was contemplated by the agreement, in the event of which the annuity was to cease. *Holyland v. De Mendez*, 3 Mer. 184.

2. Where A, carrying on business alone, took B and C into partnership, which was covenanted to be carried on for eighteen years, in consideration of a sum of money to be paid to A by B and C by instalments; and within six months after the commencement of the partnership, and when one only of the instalments had become due, A became bankrupt. Held, that notwithstanding the bankruptcy, B and C were liable to pay the remaining instalments, at the times when they would have become due if the partnership had continued. *Akhurst v. Jackson*, 1 Wilson, 47.

3. A being an attorney, prevails upon B to enter into partnership with him for the term of five years, for which he is to pay £1050, but before fourteen months are expired, A sues out a commission of bankrupt against B, which puts an end to the partnership. Held, a fraud on the part of A; and he is decreed to repay part of the premium which had already been advanced, and to deliver up a bond given by B for securing the remainder.—*Hamill v. Stokes*, 1 Daniell, 28.

4. A sole trader having agreed,

ALIEN ENEMY.

in consideration of a sum payable by instalments, to take two persons into partnership with him for a period of eighteen years, and having become bankrupt five months after the commencement of the partnership, when only one instalment was due, his assignees are entitled, at the respective periods, to receive the remaining instalments. *Akhurst v. Jackson*, 1 Swan, 86.

ALIEN ENEMY.

See *Proof*, 2.

Petitioning creditor, 6.

ALLOWANCE.

See *Surplus*, 2.

Bankrupt's allowance, 1.

AMENDMENT.

See *Action*, 6.

Practice, 9.

ANNUITY.

See *Proof*, 11, 27, 28, 29, 30.

Principal and Surplus, 4, 8.

1. An annuity being duly registered according to the statute 17 Geo. III. c. 26. Held, it was not necessary that an equitable mortgage, taken as a further security, at a subsequent period, should be registered. *Ex parte Price re Palmer*, 1 Buck C. B. 221.

2. Where the grantor of an annuity, secured by real property, becomes a bankrupt, and arrears of the annuity become due after the bankruptcy, the real security will, on the petition of the grantee, be ordered to be sold, and the produce applied in satisfaction of the annuity.

APPEAL.

tisfaction of so much of the arrears and value of the annuity, as the same will extend to satisfy, and the grantee be allowed to prove the residue under the commission. Ex parte *Key*, 1 Madd. 426.

3. Proof in bankruptcy before the statute 49 Geo. III. c. 121. s. 17, for the value of an annuity under the penalty of a bond forfeited. Ex parte *Thistlewood*, 19 Ves. 243.

4. Grant of annuity void for want of a memorial registered, being charged on an estate of less annual value than the annuity; the grantor, being the grantee's attorney, preparing the security, and depositing the title deeds, but misrepresenting the value of the estate. Proof admitted under his bankruptcy, only for the money advanced, with liberty to file a bill for an equitable lien upon the fund, and the deposit. Ex parte *Wright*, 19 Ves. 255.

5. A granted an annuity to B, secured by bond and warrant of attorney. Two years after, he deposited a lease with B, as a further security for the payment of the annuity. B became bankrupt. Held, that the subsequent security need not be memorialized, and the usual order was made for the sale of the lease, valuation of the annuity, &c. Ex parte *Price* re *Pulmer*, 3 Madd. 132.

APPEAL.

See *Petition*, 11.

1. A petition of appeal from the Vice-Chancellor's order must

Vol. I.

APPROPRIATION.

have the signature of a barrister. Ex parte *Halt* re *Wood*, 1 Bank. C. B. 429.

APPOINTMENT.

See *Power*, 1.

APPROPRIATION.

1. V, a customer of the banking-house of D and Co. transfers to N, a partner in the firm, a sum of stock, by way of security for money borrowed of them, and gives notes for the amount, payable on the stock being re-transferred to him. He pays off these notes, and afterwards borrows a further sum on the joint note of himself and his son, without calling for a re-transfer. The stock so transferred, having been blended with other stock, of which N was in like manner possessed, by way of security for other customers, is sold by the partnership, and the produce applied to the use of the partnership, except a small balance still remaining in the name of N. D, (another of the partners), afterwards dies, and the partnership is carried on without any alteration of firm, till the surviving partners become bankrupt. On the bill of V against the assignees of the bankrupts, and against the representatives of D, it was decided that he was entitled to the stocks remaining in the name of N, (the other creditors, in respect of stocks transferred, having been satisfied their demands), as being sufficiently appropriated, to set off, against the joint note of himself and his

T T

ARREST.

son, so much of the money received by the partnership, out of the sale of the remainder of the stock, as was equal to the amount of such joint note; to prove the residue as a debt against the estate of the bankrupts; and to receive from D's estate the amount of the deficiency. *Vulliamy v. Noble*, 3 Meri. 593.

ARREST.

See *Bankrupt's Privilege*, 1, 2, 3, 4.

1. A creditor issued a writ against the bankrupt, and then proved his debt under the commission. The bankrupt was afterwards arrested, and several detainers were lodged against him. Held, that the bankrupt should be discharged from the arrest and all the detainers, the arresting creditor to pay all the costs. Ex parte *Moore re Moore*, 1 Buck C. B. 521.

2. A bankrupt having escaped out of the custody of the marshal, and being at large, surrenders to a commission subsequently issued, and receives the protection conferred by 5 Geo. II. c. 30. § 5. Held, that he may, notwithstanding, be retaken and detained in custody by the marshal. *Anderson v. Hampton*, 1 Barne and Ald. 308.

3. Where defendant has been arrested in an action, brought in the name of a bankrupt by the authority of his assignees, he cannot be afterwards arrested at the suit of the assignees for the same cause of action, unless the first action has been discontinued, or

ASSIGNEES.

the costs paid. *Carter v. Hart*, 1 Chitty 276.

ASSIGNMENT OF BOND.

See *Bond*, 1, 2, 3.

ASSIGNEES.

See *Suit in Equity*, 1.

Petition, 3.

Estate, 1, 2.

Proof, 15.

Act of Bankruptcy, 5.

Action, 6, 7, 8.

Bank of England, 1.

Bargain and Sale, 5.

Costs, 4, 5.

Dividend, 3.

Fraudulent Conveyance, 1.

Lease, 7, 8, 9.

Messenger, 1.

Pleading, 2, 7.

Solicitor, 10.

Possession, 1.

Specific performance, 3.

Sheriff, 1.

1. The representatives of a surviving assignee of an estate that had paid twenty shillings in the pound, all the commissioners being dead, were ordered to execute a power of attorney to a receiver appointed under a decree of the court, in a cause in which the surviving assignee was a defendant, to collect and get in the said estate, they being indemnified. *Two good v. Hankey*, 1 Buck C. B. 65.

2. Assignees give checks upon the banker of the estate to an agent, to enable him to purchase exchequer bills for the benefit of the estate. The agent receives the money at the bank, and converts it to his own use. The mo-

ASSIGNEES.

ney is subsequently replaced in the bank. Held, that the assignees are not under the 49 Geo. III. c. 121. s. 4. chargeable with £20 *per cent* upon the monies so misapplied by their agent. *Ex parte Wilkinson re Wilkinson*, 1 *Buck C. B.* 197.

3. It is not a ground for the removal of assignees, that the commissioners have improperly rejected the proof of a debt that would have turned the choice, unless the rejection was fraudulent. *Ex parte Durent re Enfield*, 1 *Buck C. B.* 201.

4. An assignee who retires, must give security, to be approved of by the master, to protect the estate against any costs that may arise in any action at law, or suit in equity, occasioned by his retiring. He must also permit the new assignee to use his name in the actions at law. *Ex parte Thorley re Roberts*, 1 *Buck C. B.* 231.

5. Assignees made to pay the costs of a trial upon an issue directed to try the validity of the commission, they being the plaintiffs, and the bankrupt the defendant; but they were not made to pay the costs of the petition to supersede the commission. *Ex parte Edwards re Edwards*, 1 *Buck C. B.* 232.

6. Where the commissioners had improperly rejected the petitioner's proof to a very large amount, whereby two creditors, for comparatively trifling sums, were enabled to choose the assignees, a new choice was directed, the petitioner indemnifying the estate against all the costs. *Ex*

parte Edwards re Riddall, 1 *Buck C. B.* 411.

7. A retiring assignee must pay the costs of the meeting for a new choice, and the costs of his application to retire. If the new assignee do not continue any legal proceedings already commenced, the retiring assignee must pay the costs incurred by them, unless the master report such costs were properly incurred. The retiring assignee to permit his name to be used in any legal proceedings already commenced, he being indemnified by the new assignee. The indemnity to be settled by the master. In the matter of *William James Roberts*, 1 *Buck C. B.* 465.

8. The creditors of a bankrupt appoint the Bank of England as the place where the estate shall be deposited. A dividend is declared. Two of three assignees sign drafts for the dividends, which they forward to the other assignee for his signature. He also signs them, and receives the money, which he applies to his own purposes. Upon his death, a creditor's suit is instituted for the administration of his assets. Held, 1st. That under the covenant which the assignees entered into with the commissioners, the misapplied dividends were a special contract debt due from the estate of the assignee who had misapplied them, to the estate of the bankrupt. 2d. That the estate of the assignee was liable, under the 49 Geo. III. c. 121. s. 4. to pay £20 *per cent.* upon the funds misapplied. 3d. That the £20 *per cent.* was not a speciality.

ASSIGNEES.

but a simple contract debt. 4th. That the £20 *per cent.* was part of the general estate of the bankrupt, and did not belong to the creditors entitled to the misapplied dividends. *Wackerburth v. Powell*, 1 *Buck C. B.* 495.

9. Where, through the error of the commissioners, the great body of the creditors were prevented from proving their debts, and voting in the choice of assignees, a new choice was directed. *Ex parte Hawkins re Holmes*, 1 *Buck C. B.* 520.

10. A messenger under a commission of bankrupt sues the assignees for his costs and expenses, and obtains a judgment against them. One of the assignees pays the debt and costs under the judgment. He has a right to an action of contribution against his co-assignee, and is not bound to show that any funds came into his hands from the bankrupt's estate. *Hart v. Biggs*, 1 *Holt N. P. Rep.* 245.

11. Assignees are not concluded by putting up the premises to sell, they may make an experiment to see if the lease be beneficial; but in a case where they put up the premises to auction, and found a purchaser, and received a deposit, but the contract of sale afterwards went off without the assignees showing any reason why they did not enforce the sale: Held, that they were liable to the payment of rent, as "assignees of all the estate and interest," &c. of the bankrupt in the premises. *Haastings v. Wilson*, 1 *Holt N. P. Rep.* 290.

12. In an action of replevin,

between the assignees of a bankrupt (who was formerly tenant to A), and the bailiff who distrained, one issue is, whether the assignees are tenants to A. A verdict against the assignees, on this issue, is afterwards conclusive as to the tenancy of the assignees in an action brought by A for rent. *Hancock v. Welsh and Cooper*, 1 *Starkie N. P. Rep.* 347.

13. The assignees under a commission of bankrupt may maintain an action on a promissory note given as a collateral security for goods sold by them to one of the bankrupts. The defendants undertaking by such note to pay on demand, cannot adduce evidence to show a liability on a contingency only. *Rawson v. Walker*, 1 *Starkie* 361.

14. A bankrupt carries on the business of a coachmaker, for the benefit of the creditors, as their agent, under the authority of the assignee, and orders goods in his own name, which are used in the business: the assignee is liable for goods bought for the use of the business. *Kinderv. Howarth*, 2 *Starkie*, 354.

15. Sum paid by mistake by an assignee of one bankruptcy to assignees under another bankruptcy, and divided amongst the creditors by the latter, directed to be paid out of future effects. *Ex parte Bignold and Kent*, assignees of *Robert Leeds*, a bankrupt, in re *Samuel Charles*, 2 *Mad.* 470.

16. An assignee becoming bankrupt with monies in his hands, his estate is not entitled

AND TO THE CONTEMPORARY CASES.

619

ASSIGNMENT.

to any dividend on the proof made by him under the estate of which he was assignee, until full reimbursement of money which such assignee had in his hands. *S. C.*

17. Separate creditors not entitled to vote in the choice of assignees under a joint commission of bankruptcy. *Ex parte Jepson*, 19 *Ves.* 224.

18. Assignee discharged from being such, on his own petition, but on terms. *Ex parte Thorley* in re *Roberts*, 3 *Mad.* 273.

19. The solicitor of the assignees of a bankrupt tenant, upon whose lands a distress had been put by the landlord, gave the following written undertaking—“We, as solicitors to the assignees, undertake to pay to the landlord his rent, provided it do not exceed the value of the effects distrained.” Held, they were personally liable.—*Burrell v. Jones*, 3 *Barn. and Ald.* 47.

20. Where the assignees of an uncertificated bankrupt, by agreement, for a valuable consideration paid to them by a third person, had left the bankrupt's furniture, &c. in his possession, and afterwards, notwithstanding such agreement, seized the same:—It was held, that they were justified in so doing, an uncertificated bankrupt not being entitled to retain any property against his assignees. *Nias v. Adamson*, 3 *Barn and Ald.* 225.

ASSIGNMENT.

See *Commission*. 10.
Rent, 1.

ATTORNEY,

ATTACHMENT.

See *Election*, 1, 2.

1. P, a partner in two houses of trade originating in the West Indies, where his partners continued to carry on the business, but being himself resident in London, receiving and disposing of consignments from and shipping goods to his partners abroad, comes bankrupt. On bill by assignees against a creditor of the two firms, having attached the West Indies property belonging to both, for an account of what he had received by means of his attachments. Held, the defendant was entitled to retain what he had received, to the extent of satisfying his personal debts, and to account only for the over surplus. *Brickwood v. Miller*, 3 *Meri.* 279.

2. Different from the case when the bankrupt was the sole debtor, and where the trade was in England only, and the attachments laid in London. *Shaw*

ATTORNEY.

1. An attorney, who becomes a general depository of the money of his clients, and of other persons, which he invests in securities, charging, in addition to his fees for preparing the securities, a compensation (determined by what name) and unites this occupation with the business of a conveyancer, is a trader within the meaning of the bankrupt laws. *Hutchins v. Gascoigne*, 1 *Holt.* 507.

AUCTION DUTY.

2. An attorney, whose principal business is in the transaction of annuities, for which he charges a commission, and who, in the course of obtaining them for those who employ him, receives large deposits of money, which he pays into a banker's hands in his own name, is not a scrivener within the bankrupt laws. *Hurd v. Brydges*, 1 *Holt* 654.

3. An attorney cannot maintain an action for preparing an affidavit of debt or bond to the Lord Chancellor, with a view to sue out a commission of bankrupt, unless a bill has been delivered pursuant to 2 *Geo. II. c. 23. s. 23*. *Burton v. Chatterton*, 2 *Starkie* 522.

AUCTION DUTY.

1. G, having a fee simple in lands, mortgages for a term of 1000 years: he has no longer any estate or interest in the lands higher than an equity of redemption.

And if, upon his becoming bankrupt, his assignees take upon themselves to sell the whole property absolutely, as the estate of the bankrupt, such a sale is not within the exemption of the 19th *Geo. III. c. 56. s. 15*, and is therefore liable to the auction duty. *Quere*—If the assignees had previously redeemed the estate.

Nor will the court on such a sale deduct the proportional part of the duty payable on the value of the equity of redemption; for they consider the entire duty to be payable by the auctioneer on the whole, at the conclusion of

BAIL.

the sale; and if the interests are blended so indiscriminately by the assignees, whose duty it is to keep them apart, the court will not relieve them. *The King v. Abbott*, 3 *Price* 178.

AUXILIARY COMMISSION.

1. Application for an auxiliary commission to examine a bankrupt refused. In the matter of —, 1 *Bank C. B.* 523.

BAIL.

See *Certificate*, 18, 25.
Practice, 6.
Principal and Surety, 5.

1. An affidavit to hold to bail, denying a tender in bank notes, is sufficient, though it do not say no tender has been made to the parties, viz. where a bankruptcy has intervened to the bankrupt and his assignees. *Armstrong v. Stratton*, 7 *Taxt.* 405.

2. An affidavit to hold to bail, stated that the action was brought by the assignees of T. F, a bankrupt, to recover £369, by virtue of a bond entered into by the defendant, as surety for T. F, in £5000, conditioned for performance of an award touching matters between T. F and M; that an award was made pursuant to the condition, directing T. F to pay on demand £369; that a personal demand had been made, but that T. F did not then pay, nor had he or any other person since paid, and that no tender had been made in bank notes. Held, that this affidavit was insufficient, as it shewed no cause

BAIL.

of action. But held, that the denial of all tender in bank notes was good, without expressing in particular that none was made to the plaintiff or the bankrupt. *Armstrong v. Stratton*, 7 Taunt. 405.

3. The court will not relieve the bail of a bankrupt who are fixed between the signature of the bankrupt's certificate by his creditors and the commissioners, and the time of the allowance of the certificate by the Lord Chancellor. *Stapleton v. Macbar*, 7 Taunt. 589.

4. Semble, that a bankrupt's certificate has no relation back to any earlier period than the Lord Chancellor's allowance thereof. *S. C.*

5. Bail on oath of assignees of a bankrupt, who will not make an affidavit, and of committeees of a lunatic. *Stewart v. Grahm*, 19 Ves. 316.

6. The court will not exonerate the bail upon the defendant having become bankrupt and obtained his certificate, without giving the plaintiff an opportunity of trying, by an issue, whether the certificate were fairly obtained. *Woolcot v. Leicester*, 6 Taunt. 75.

7. Bail, who could not say whether during the interval of his bankruptcy and obtaining his certificate, he had or had not justified as bail; not permitted to justify. *Bennet's bail*, 1 Chitty 289.

8. Discharge under the insolvent debtor's act, 53 Geo. III. c. 102, disqualifies bail from justifying, as future effects are liable

BANK OF ENGLAND.

under that act. But bankruptcy is not of itself an objection, when the party has obtained his certificate. *Smith v. Roberts*, 1 Chitty, 9.

9. Where subsequently to taking bail in the country, one of the parties became bankrupt, the court gave time to add and justify another bail. *Anonymous*, 1 Chitty, 11.

BANKERS.

See *Partners*, 12, 13.

Securities, 1.

Usury, 1.

BANKER'S BOOKS.

See *Evidence*, 8.

BANKERS TO THE ESTATE.

1. Bankers appointed under a commission of bankruptcy, becoming bankrupt, their estate cannot have any dividend on debt previously due to them, until the whole, received by them as bankers to that estate, has been accounted for. *Ex parte Bebb*, 19 Ves. 222.

BANK OF ENGLAND.

1. A person authorized by the Bank of England, by a general power of attorney, may prove a debt due to them under a commission of bankruptcy; and a person authorized by them by a special power of attorney for that purpose, may vote for them in the choice of assignees. *Ex parte the Bank of England re Stevens*, 1 Wils. Ch. Rep. 295.

BANKRUPT.

BANKRUPT.

See *Arrest*, 1.

Surrender, 3.

Action, 10, 11, 12.

Demurrer, 1.

Assignees, 20.

1. A bankrupt cannot refuse to discover the particulars relating to his estate and effects, although such information may tend to show that he has committed a criminal act; but if the question put to him be, whether or not he has done an act clearly of a criminal nature, he may refuse to answer it; so where a petition prayed that the creditors might be at liberty to examine the bankrupt, whether he or any person in trust for him, or for his benefit, have received or are to receive any sum of money or other valuable consideration for his having resigned, or as an inducement to resign the office of town clerk of the city of Bristol, it was dismissed. *Ex parte Cassens*, re *Worrall*, 1 *Buck C. B.* 531.

2. Bankrupt represents his estate until assignees are chosen. *Ex parte Mohine*, 19 *Ves.* 217.

3. Protection of a bankrupt from arrest under an extent, while attending the commissioners on the day appointed for his examination, and remaining in another room in the same house during an interval of adjournment, on that day, on the general principle of law, protecting a witness. The order to discharge made on the gaoler, not, as in the case of a private creditor, on the

BANKRUPT'S ALLOWANCE.

party. *Ex parte Russell*, 19 *Ves.* 163.

4. A bankrupt having surrendered to his commission, refused to answer certain questions put to him by the commissioners, relative to the disposition of some of his property. Held, that this did not amount to felony within 5 *Geo. II. c. 30, s. 1*. *The King v. Page*, 3 *Moore* 656.

5. An uncertificated bankrupt cannot maintain an action of trespass against subsequent creditors, for breaking open his house, and seizing his after acquired property, although his assignees do not ratify the seizure, and although they were unknown to the defendants until after the commencement of the action. *Hully v. Pickersgill*, 2 *Moore* 612.

BANKRUPT'S ALLOWANCE.

See *Surplus*, 2.

1. The usual order having been obtained to take the accounts of the joint and separate estate under a separate commission, the joint estate paid seventeen shillings, and was sufficient to pay the remaining three shillings in the pound, leaving a surplus in the hands of the assignees. Upon taking the partnership accounts, a balance appeared in favor of the solvent partners. The separate estate had paid three shillings in the pound. Held, that the bankrupt was not entitled to an allowance under 5 *Geo. II. c. 30, s. 7*. *Ex parte Terrell* re *Taylor*, 1 *Buck C. B.* 345.

BARON AND FEME.

BANKRUPT'S PROTECTION.

See *Arrest*, 2.

Bankrupt, 3.

Bankrupt's Privilege, 1, 3, 4.

BANKRUPT'S PRIVILEGE.

See *Bankrupt*, 3.

1. If a bankrupt pass his last examination on the forty-second day, the statute 5 Geo. II. c. 30, protects him from arrest during the whole of that day; but if the time had been enlarged beyond the forty-second day, *quære*, whether he would have been protected. Ex parte *Davies re Davies*, 1 Buck C. B. 80.

2. Where a creditor, who petitions to prove his debt, holds the bankrupt in arrest under mesne process, he is entitled to his discharge instant, upon the order for the proof. Ex parte *Irving re M'Kenzie*, 1 Buck C. B. 423.

3. If the time for the bankrupt's last examination be enlarged, the statute 5 Geo. II. c. 30, protects him from arrest during the whole of the last day of examination. *Simpson's case*. 1 Buck C. B. 424.

4. When the commissioners adjourn the last examination of a bankrupt, he is privileged by statute 5 Geo. II. c. 30, from arrest during the whole of the day to which it is adjourned. Ex parte *Simpson*, 2 Wills. 127.

BARON AND FEME.

See *Deed of Separation*, 1.

Marriage Settlement, 2, 3, 4.

BARGAIN AND SALE.

Proof, 17, 19.

Set off, 15.

1. A commission having been superseded, with costs to be paid by the petitioning creditors, one of them being a woman, after the costs were taxed, married; her husband ordered to pay the taxed costs within a fortnight. Ex parte *Eagle re Taylor*, 1 Buck C. B. 548.

2. Equity of a bankrupt's wife against the assignees of her husband, or their vendee, for a settlement of her *choses* in action. Jewish settlement. *Bassivi v. Serra*, 3 Meri. 674.

BARGAIN AND SALE.

See *Copyhold Estates*, 1.

Supersedeas, 13.

1. Where an assignee had absconded, the bargain and sale ordered to be vacated from the date of the order. Ex parte *Corry re Mullens*, 1 Buck C. B. 314.

2. The bargain and sale cannot be vacated partially, it must either be vacated altogether, or not at all. In the matter of *Goodchild*, 1 Buck C. B. 322.

3. The assignment and bargain and sale vacated under the circumstances of the case, without directing a new choice of assignees. Ex parte *Kersley re Russell*, 1 Buck C. B. 477.

4. *Quære*—The effect of vacating a bargain and sale in bankruptcy, as to preceding purchasers under the commission. Ex parte *Harris re Buchanan* and *Benn*, 3 Mad. 473.

BILLS OF EXCHANGE.

5. One of two assignees having quitted the country, a petition was presented by the remaining assignee, that the bargain and sale to the two assignees might be vacated, and that a choice should be made of a new assignee in the stead of the one abroad, and that a new bargain and sale might be executed to the petitioner and the new assignee; and that service of the petition at the last place of residence of the assignee abroad might be deemed good service. On production of an affidavit of service of the petition, an order was made according to the prayer of the same. *Ex parte Bonbonno re Lemon*, 3 *Mad.* 231.

6. A joint commission of bankruptcy having issued against the tenant for life and the tenant in tail—Held, that the assignees, by the bargain and sale, only took an estate for life in the premises, and a base fee in remainder. *Jervis v. Talcour*, 3 *Barn.* and *Ald.* 557.

BASTARDY BOND.

See *Certificate*, 17, 19.

BILL OF DISCOVERY.

See *Pleading*, 1.

BILL IN EQUITY.

See *Suit in Equity*.

BILL OF SALE.

See *Ship Registry Acts*, 2, 4.

BILLS OF EXCHANGE.

See *Proof*, 7, 26.

Petitioner's Creditor's Debt, 1, 3.

Limitations, Statute of, 2.
Mutual Debts and Credits, 2, 3.

Partners, 25.

Principal and Surety, 7.

Set off, 7.

Short Bills, 1.

Relation to the Act of Bankruptcy, 2.

1. If A and B are partners in a trade carried on in the name of A only, and A draws bills in his own name, payable to his order, which he indorses, and afterwards B also indorses, and procures them to be discounted, there is no legal contract for a holder to maintain an action against A and B upon the bills, unless it appear that A drew and indorsed the bills in the character of, and as representing A and B. *Ex parte Bolitho re Blackburn*, 1 *Buck C. B.* 100.

2. A person discounting the bills may have a right of action against A and B jointly, for money had and received, if he can shew that they received the money, by means of the bills, for partnership purposes. *S. C.*

3. A employs B to get bills which he had not indorsed, discounted for him; B in order to effect the discounting, indorses them. Held, that A's estate must relieve B's from the liability incurred by the indorsements. *Ex parte Robinson re Nunn and Barber*, 1 *Buck C. B.* 113.

4. Six persons are in partnership as bankers, two of them carry on a distinct trade in partnership. The two have bill transactions with G, in the course of

BILLS OF EXCHANGE.

which, in exchange for a bill drawn by them upon and accepted by him, they deliver to him a bill drawn and accepted by the six partners, but not indorsed by the two in their separate character; G also procures a bill of exchange delivered to him by the two partners without their indorsement, to be discounted at the Bank of England, and pays over the proceeds to them; G pays his acceptance, but both the other bills are dishonored. Held, that G lent his credit to raise the money wanted by the two partners, and therefore he was entitled to prove against their estate for the amount of both the bills, deducting the dividends received under the commission of one of the acceptors. *Ex parte Hustler re Goodchild*, 1 Buck C. B. 171.

5. The drawer of bills of exchange deposits short bills with the acceptor, to cover his drawing account. The drawer and acceptor become bankrupts. The holder of the acceptances can call upon the assignees of the acceptor, to apply the short bills in discharge of the acceptances, to the extent of the lien which the acceptor had upon them at the time of his bankruptcy. To ascertain that lien an enquiry directed. *Ex parte Parr re Brickwood*, 1 Buck C. B. 191.

6. Whether bills in the possession of a bankrupt, not due at the time of the bankruptcy, pass to the assignees, or remain the property of the remitter, always depends upon the question of agency. So where a foreign

mercantile house remitted to a London house bills, some of which were not due when the London house became bankrupt, it was held, under the circumstances of the case, that the London house acted as agents to procure payments for the foreign house, and being fixed with the trust, that the bills did not pass to the assignees. *Ex parte Smith re Power and Warwick*, 1 Buck C. B. 355.

7. Held, that where A, at the request of B, and upon the security of a bill of exchange from him for the amount, delivers goods to C, and such goods are afterwards partly paid for by C, and then B becomes bankrupt. A can only prove, as against the estate of B, the sum remaining due for the goods, and not the full amount of the bill. *Ex parte Reader re Willats*, 1 Buck C. B. 381.

8. T was in partnership with M and F, he also carried on a separate trade, and being indebted £100, on his separate account, to K, he sent him a bill of exchange, that wanted two months of becoming due, for £300, indorsed by T, M, and F, but not by T, in his individual character; and requested K to give him credit for £100, and to send him a bill for the remainder of the £300. K gave him credit for £100, and sent him a banker's check for £200, which was duly paid. The bill for £300 was dishonored; T, M, and F became bankrupts. Held, that K was not entitled to prove for any part of the £300

BILLS OF EXCHANGE.

against the separate estate of T. Ex parte Kirby re Moore, 1 Buck C. B. 511.

9. Bill lodged in a banker's hands to be applied for a particular purpose, but not so applied, claimable on the banker's becoming a bankrupt: Ex parte Aiken, 2 Madd. 192.

10. The drawer of a bill, accepted for his accommodation, indorses it for value to his bankers, and, before the bill becomes due, becomes bankrupt: The bankers, who knew that the bill was accepted for the accommodation of the drawer, cannot recover from the acceptor more than the amount of their balance, as between them and the drawer, at the time of his bankruptcy. Jones v. Hibbert, 2 Sturkie, 304.

11. Bills, remitted by a country bank to their banker in London, remaining at his bankruptcy in his hands, undue or unapplied according to the authority given, or afterwards coming to the hands of the assignees, and the proceeds received, restored and paid to the remitters, taking up the acceptances on their account and subject to the banker's lien for any balance; by the contract remaining the property of the remitters in the hands of the banker as agent for a particular purpose, viz. to hold until due, and receive the proceeds, then first forming an item in the cash account. The circumstance of the bill being written short is only evidence of a trust, proved in this instance by express declaration, or other evidence equivalent. Ex parte Pease, Towns-

end, Farley, Daniel, and Banks re Boldero, 19 Ves. 25.

12. The statute 21 Jac. 1, c. 19, s. 11, not applicable to bills in the hands of a banker, written short, or sent for a particular purpose; the trust accounting for the possession: being considered as goods in the hands of a factor, with the single distinction that he cannot pledge; but if the bills are dealt with before bankruptcy, the money cannot be followed, as, if dealt with afterwards, it may. S. C.

13. An action of trover cannot be maintained by the assignees of a bankrupt to recover bills of exchange from the holder, who drew them with a knowledge of the bankrupt's insolvency, and after compelling such bankrupt to sign, induced his creditors, who were not aware of his circumstances, to accept them. Walker v. Laing, 1 Moore 281.

14. A person having three bills of exchange, applied to a country banker with whom he had had no previous dealings, to give for them a bill on London, of the same amount, and the bill given by the banker was afterwards dishonored. Held, that this was a complete exchange of securities, and that trover would not lie for the three bills of exchange. Held also, that if the exchange had not been complete, still that the banker, having become a bankrupt, and the three bills having come to the possession of his assignees, must be considered as goods and chattels in the order and disposition of the bankrupt at the time of his bankruptcy.

BILLS OF EXCHANGE. BOND.

cy, within the statute of James, *Hornblower* and *others* against *Proud*, 2 Barn. and Ald. 327.

15. Distinction between discount and deposit of bills, depending on not the mere fact of indorsement, but the intention to make an absolute transfer, giving full power to go against all parties on the bills, or merely to enable the person, with whom they are deposited, to receive the amount from the other parties. Indorsement *prima facie* evidence of the former; unless the object of mere deposit is clearly shewn. *Ex parte Twogood*, 19 Ves. 229.

16. Inference from a mortgage, and the want of indorsement upon some bills in a remittance, that the object as to the whole was deposit not discount. *Ex parte Twogood*, 19 Ves. 231.

17. Bill remitted, indorsed merely to enable the person receiving it to raise money to meet future advances, is, while retained, a mere deposit, applicable to the demands of the remitter, subject to the right, under the indorsement, of constituting a third person creditor by negotiating it, who in case of bankruptcy will prove. *Ex parte Twogood*, 19 Ves. 232.

18. Notice of a dishonored bill to a bankrupt, as drawer, before the choice of assignees, good. *Ex parte Moline*, 19 Ves. 216.

19. Immediate notice of a bill dishonored at an early hour, good. *S. C.*

20. G. accepted a bill for J and W. J., for £493, and they gave him a bill drawn by others

on another firm, but did not indorse the bill. On the bankruptcy of J and W. J., the acceptance of G having been paid by him before their bankruptcy, he was allowed to prove against their estate, after deducting what he had received on the bill given by them to G, such bill being considered only as a security. *Ex parte Hustler re Goodchild*, 3 Mad. 117.

21. J and W. J. got G to get discounted at the bank a bill for £853, but they did not indorse the bill. The proceeds of the bill when discounted were paid to J and W. J. The bill was dishonored, and G, as indorser, paid the amount to the bank. Held, that G was entitled to prove against the estate of J and W. J., after deducting what had been received under the commission against the acceptors of the bill. *S. C.*

BOND.

See *Docket*, 23.

Order and disposition, 2.

Proof, 23.

Lessor and Lessee, 3.

Certificate, 17, 19,

1. A creditor aggrieved by the issuing of a fraudulent commission, cannot, under the 5 Geo. II. c. 30, s. 23, call for an assignment of the bond given to the Lord Chancellor, on the issuing of the commission. *Ex parte Bamford*, 2 Madd. 1.

2. A party, against whom a commission of bankruptcy had maliciously been obtained, and to whom, after superseding the com-

CERTIFICATE.

mission, the Lord Chancellor had assigned the petitioning creditors' bond, having afterwards brought an action on the case against the petitioning creditor, and a rule of court having been made by consent, referring the matters in dispute, except the bond assigned, to the award of an arbitrator; and an award having been made, with an exception of the bond, an action cannot be maintained on the bond. An action on the case is a waiver of a right of action on the bond; and to restore that right, the agreement of the parties must be unequivocal. — *Holmes v. Wainwright*, 1 *Swan*. 20.

3. The assignment of the petitioning creditor's bond by the Lord Chancellor, is conclusive evidence of malice. *Holmes v. Wainwright*, 1 *Swan*. 23.

BOND, PETITIONING CREDITOR'S.

See *Petitioning Creditor. Bond*.

CARRIER.

See *Stoppage in Transitu*, 3.

CERTIFICATE.

See *Affidavit*, 1, 11.
Supersedeas, 5, 7.
Foreign Courts, 1.
Bail, 3, 4, 7, 8.
Gaming, 1, 2.
Legacy, 1.
Partners, 27.

1. The court will not discharge a certificated bankrupt out of custody, without giving the par-

ty, at whose instance the attachment is issued, time to show that the certificate was fraudulently obtained. *Nowers v. Colman*, 1 *Buck C. B.* 5.

2. Petition to stay a certificate must be personally served on the bankrupt before the petition day. Ex parte *Harford* re *Brown*, 1 *Buck C. B.* 38.

3. Semble a petition to stay a certificate prospectively, cannot be supported. Ex parte *Groome* re ———, 1 *Buck C. B.* 39.

4. Though a bankrupt applies to the court to have a petition to stay his certificate advanced, yet that is not a waiver of his right to be personally served before the petition day. Ex parte *Groome* re ———, 1 *Buck C. B.* 39.

5. A bankrupt, by answering an affidavit, does not waive his right of being personally served with a petition to stay his certificate. Ex parte *Harford* re *Brown*, 1 *Buck C. B.* 39.

6. If a plaintiff in equity might proceed at law for that which he demands by his bill, either by an action of assumpsit, or by an action for the tort, the bill may be demurred to, if it be in the nature of an action for the tort; but if it be in the nature of an action of assumpsit, the defendant may plead his bankruptcy and certificate. *De Tastet v. Walker*, 1 *Buck C. B.* 153.

7. The court will not stay a certificate upon the petition of a creditor who has not come in under the commission, and who has the means of trying the validity of the certificate at law. Ex

CERTIFICATE.

parte *Dodson re Greenwood*, 1 Buck C. B. 225.

8. Where a petition to stay a certificate fails, it is not of course that the petitioner should be ordered to pay the costs. Ex parte *Stevens re Aubert*, 1 Buck C. B. 369.

9. Upon a petition to stay a certificate imputing conduct to the bankrupt which, if proved, would amount to felony, the court will not direct an issue to try the fact of conformity. Ex parte *Scott re Nias*, 1 Buck C. B. 275.

10. Where a bankrupt has been long in possession of his certificate, the court will not recall it. Ex parte *Reed re Sow-erby*, 1 Buck C. B. 430.

11. Upon a petition to stay a certificate, issue directed to try whether the bankrupt had lost £5 at a horse race. Ex parte *Henderson re Henderson*, 1 Buck C. B. 557.

12. Petition to stay a bankrupt's certificate upon allegation of concealment, sworn to only upon information and belief, dismissed with costs. Ex parte *Joseph*, 18 Ves. 340.

13. A petition to prove a debt, and to stay a bankrupt's certificate, allowed, the delay in proving being accounted for. Ex parte *Birch*, 1 Madd. 600.

14. Creditor signing certificate of surviving partners, does not thereby release the estate of a deceased partner. *Sleech's case*, 1 Merivale 570.

15. The statute gives the release in consequence of the certified conformity of the bank-

rupt. *Sleech's case*, 1 Merivale 571.

16. A bankrupt having obtained his certificate, is not liable upon a promise to pay a former debt, unless it be express, distinct, and unequivocal. *Fleming v. Hayne*, 1 Starkie, N. P. Rep. 370.

17. The obligee in a bastardy bond, after the bond had been forfeited, became bankrupt, and obtained his certificate. Held, that the parish-officers were not thereby precluded from recovering upon the bond further expenses incurred subsequent to the bankruptcy. *Overseers of St. Martin's in the Fields v. Wurren*, 1 Barn and Ald. 491.

18. Where the defendant in an action has become bankrupt, and obtained his certificate, after which proceedings are taken against the bail, the court will on motion relieve them, and will not direct an issue to try the fact of the bankrupt's being a trader, the certificate, by the 5 Geo. II. c. 30, s. 7 and 13, being made sufficient evidence of the trading &c. *Harmer v. Hagger*, 1 Barn and Ald. 332.

19. A defendant's liability as surety in a bastardy bond is not discharged by his bankruptcy and certificate. *The Churchwardens and Overseers of the Parish of St. Martin v. Warren*, 2 Starkie 188.

20. A bankrupt, having obtained his certificate under a joint commission issued against him and others, is not estopped, when suing a stranger in trover, from controverting the validity

CERTIFICATE.

of the commission, or from taking advantage of its illegality, as against such stranger, between whom and the plaintiff there is no reciprocity. *Butts v. Bilke*, 4 Price 240.

21. Liability of bankrupt's property, notwithstanding certificate under a second commission not paying 15s. in the pound, only by judgment in an action; not to be taken by the assignees under the commission. *Ex parte Hadgkinson*, 19 Ves. 291.

22. Proofs in bankruptcy expunged, and certificate recalled, being obtained by fraud. *Ex parte Casethorne*, 19 Ves. 260.

23. Signature of one trustee to a bankrupt's certificate; without authority to act for the other, not sufficient. *Ex parte Rigby*, 19 Ves. 463.

24. By the 49 Geo. III. c. 121, s. 8, the certificate of a bankrupt is a bar not only to any action, at the suit of the surety, for the recovery of money paid in discharge of the original debt, but to any action for the consequential damage accruing from the nonpayment by the bankrupt of the original debt when due; and therefore, where the acceptor of an accommodation bill brought an action against the drawer, who had become bankrupt, for not providing him with funds to pay the bill when due, whereby he had incurred the costs of an action, and was obliged to sell an estate in order to raise money to pay the bill, the certificate was held to be a good bar. *Vax Sandau v. Creative, & Barn. and Ald.* 13.

25. The defendant, in an action

COMMISSION.

on a bail bond, (given in an action of debt against himself), becoming bankrupt, between plea and verdict in the action on the bail bond and obtaining his certificate after judgment, is discharged from the damages and costs. *Dinsdale v. Baker*, 2 Brod. and Bing. 8.

CHILDREN.

See *Voluntary Conveyance*, 2.

CHOICE OF ASSIGNEES.

See *Assignee*, 3, 6, 17.

CHOSES IN ACTION.

See *Baron and Feme*, 2.

CITY OF LONDON.

See *Attachment*, 1, 2, 4.

COGNOVIT.

See *Relation to the Act of Bankruptcy*, 3.

COMPOSITION, DEED OF.

See *Deed of Composition*, 2.

COMMISSION.

See *Docket*, 1, 4.

General Orders, 2.

Renewed Commission, 1.

Auxiliary Commission, 1.

Certificate, 20.

Misnomer, 1, 2.

Evidence, 21.

1. Issuing a commission is a disaffirmance of the petitioning creditor's right to retain against the assignees payments made by the bankrupt after the act of bankruptcy. *Ex parte Miller*, 1 Buck C. B. 286.

COMMISSION.

2. If a petitioning creditor do not proceed to issue the commission till after a month has elapsed from the striking of the docket, he must make an affidavit that the debt has not been satisfied, before the commission can issue. Ex parte *Buckley re Dickenson*. 1 Buck C. B. 367.

3. A London house guaranteed certain payments to be made by a Paris house. The solvency of the Paris house becoming doubtful, the London house duly authorized the creditor to act according to the best of his discretion in the settlement of the affairs. The creditor accordingly went to Paris, and entered into a composition for the debt with the Paris house. After the departure of the creditor from England, and previous to the composition, a commission of bankrupt issued against the London house, of which fact the parties to the composition were ignorant. Held, that the bankruptcy did not determine the authority. Ex parte *Mac Donnell re Mac Donnell*. 1 Buck C. B. 399.

4. It is not sufficient, upon an application to seal a commission as a country commission, for the affidavit to state that the major part in value of the creditors do not live within fifty miles of London, and that the major part of the creditors reside at a certain town in the country. In the matter of *Child*, 1 Buck C. B. 425.

5. Construction of the general order in bankruptcy, (29th Dec. 1806), that the commission must be sealed at the first public seal after application within four

days after the docket, though within less than seven days. Ex parte *Hyne*, 19 Ves. 61.

6. Quære, whether a joint commission, sued out against three persons, pending two previous separate commissions against two of them, is valid in law as against the third, and whether the assignees appointed under the two former commissions, (who were also assignees under the last), can maintain an action of trover, to recover property of such third person jointly with him: or whether it be absolutely void at law, so that the person, who is the object of it, cannot so join in the action; or whether such subsequent commission be surely voidable, and suspend his right to join, till the former commissions are established, or the last superseded? *Butts v. Bilke*, 4 Price 240.

7. The issuing a commission of bankruptcy is of itself sufficient notice to all the world of a prior act of bankruptcy having been committed, and the want of actual or personal knowledge of the issuing of such commission will not protect a payment made within the statute 1 Jac. I. c. 15 s. 14. *Brooks v. Sowerby*, 3 Moore 157.

8. If a merchant accept a bill of exchange after the issuing a commission of bankrupt, of which he had no notice, and pay the same to a bona fide holder. Held, that such payment was not protected by 1 Jac. I. c. 15, s. 14, as by the subsequent statutes, 46 and 49 Geo. III. the issuing a commission is declared to be a

COMMISSION.

sufficient notice of a prior act of bankruptcy having been committed. *Brooks v. Sowerby*, 2 *Moore* 55.

9. Where a prior and joint commission of bankrupt has been issued, but never acted on or superseded, such commission not being in legal operation, does not invalidate a second separate commission. *Warner v. Barber*, 2 *Moore* 71.

10. No property passes under a commission without an assignment. *S. C.*

11. The assignees of A and B, bankrupts under a joint commission, cannot maintain an action for money had and received, if it be proved that A alone had committed an act of bankruptcy; neither are they entitled to recover the separate property of A under such commission. *Hogg v. Bridges*, 2 *Moore* 122.

12. Where a commission of bankrupt issued against a person, describing him as a cattle dealer, and on the trial of an action of trespass by the bankrupt, evidence was received of a dealing in hops, and a verdict found for the defendant, which verdict was set aside, and a new trial granted, on the ground that the evidence ought to have been rejected; the Lord Chancellor refused to insert the words "dealer and chapman" in the commission, or to supersede it, and grant another of the same date. *Semble*, however, that the evidence was admissible. *Ex parte Small re Hale*, 2 *Wilson* 86.

13. Any person not a solicitor may take out a commission of

COMMISSIONERS.

bankruptcy. *Ex parte Smith*, 19 *Ves.* 472.

14. Held, that evidence of a dealing in hops was properly admitted in a cause brought to try the validity of a commission of bankrupt, describing the plaintiff as dealer in cattle, seeking his trade of living by buying and selling. *Hale v. Small*, 2 *Brod. and Bing.* 25.

COMMISSION TO EXAMINE WITNESSES ABROAD.

1. Upon a petition to expunge the proofs upon certain bills of exchange, an action had been directed to be brought against the bankrupts, to try the validity of the debt. A material witness being abroad, the court of common law put off the trial. It was ordered upon petition, that the bankrupt should be at liberty to file a bill for a commission to take the examination of the witness abroad. *Ex parte Coles re Coles*, 1 *Buck C. B.* 293.

2. Notwithstanding courts of common law have assumed the jurisdiction to grant commissions for the examination of witnesses, yet it is always competent for a party to file a bill for a commission to examine witnesses. *Ex parte Coles re Coles*, 1 *Buck C. B.* 298.

COMMISSIONERS.

See *Commitment*, 1, 2, 3, 4, 5.

Supersedeas, 6.

Evidence, 11, 19, 18, 19.

Witness, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100.

1. A commissioner, though he

COMMISSIONERS.

may not have acted, cannot become a purchaser of the bankrupt's estate, without the consent of the creditors at a general meeting. *Ex parte Harrison re—* 1 *Buck C. B.* 17.

2. The commissioners under the statute 1 Jac. I. c. 15. s. 10. have authority to examine persons supposed to have or detain a part of the bankrupt's estate, although such persons do not claim to be interested therein. *Ex parte Anderson re Gilchrist,* 1 *Buck C. B.* 397.

3. A creditor of the bankrupt was, without his privity, named a commissioner under the commission, but declined acting as such, and afterwards was chosen an assignee. On the petition of a creditor he was restrained from acting as commissioner. *Ex parte Crundwell, 2 Mad.* 292.

4. Commissioners of bankrupt are authorized to examine a witness concerning the person, trade, dealings, estate and effects of the bankrupt; and incidentally to this power they may examine him also respecting other individuals, through whom they may be likely to obtain information on those points. And therefore, where a witness was asked questions as to when and where he last saw the bankrupt's wife;—Held, that such questions were legal and material, and that the commissioners were justified in committing him for giving unsatisfactory answers to those questions. Held also, that the true criterion by which to judge as to the propriety of the commitment, was to consider all the questions and

COMMITMENT.

answers collectively, and then to say whether the whole examination was satisfactory or not; and therefore, where the commissioners in their warrant set out several questions, to some of which, taken alone, the answers were satisfactory:—Held also, that this was no objection to a warrant committing the party "till he should full answer make to the questions so put to him as aforesaid." *Ex parte Vogel re Ehrenstrom, 2 Barn. and Ald.* 219.

COMMITMENT.

See Commissioners, 4.

1. A bankrupt being committed by the commissioners for not answering, it appeared that, in the questions put to him, the commissioners had stated facts of which they were informed by the deposition of the messenger; but the deposition was not set forth in the warrant, nor did it thereby appear to have been read to the bankrupt at the time of his examination. Held, that the commitment was substantially insufficient, and that the court could not commit the bankrupt under 5 Geo. II. c. 39. s. 17. *Crowley's case, 1 Buck C. B.* 264.

2. If in committing a bankrupt for not answering satisfactorily, the commissioners are influenced by extrinsic evidence, the validity of the commitment. *Crowley's case, 1 Buck C. B.* 264.

3. Commissioners of bankrupt make a warrant for the commitment of a bankrupt for refusing to be examined, the bankrupt being already confined in the

COMMITMENT.

king's bench under previous process, (semble) the issuing of the warrant by the commissioners does not amount to an imprisonment by them, till the warrant is in some way operative to the detention of the party independently of the other process. But if the warrant operate to the confinement of the party within narrower bounds, it is an imprisonment by the commissioners. *Crowley v. Impey*, 2 Starkie 261.

4. Where a warrant of commitment by commissioners of bankrupt, after setting out the issuing of the commission, the adjudication of bankruptcy, &c. stated as the ground of commitment, that the bankrupt being brought before them, and they having proposed to administer an oath to him, he refused to be sworn, or to give an account of his property. Held, that such warrant was legal, and that it was not necessary in it to set out any specific question in such case, for this is a refusal to answer all possible questions which can be suggested. Held also, that after the issuing of the writ of Habeas Corpus, and before the return to it, the commissioners may if necessary make a fresh warrant, stating more fully the cause for detaining the bankrupt in custody, and that such warrant may by words of reference incorporate the formal parts of the first warrant. Held also, that if both warrants are defective in form the court will, if a substantial cause of commitment appear, recommit the bankrupt *ex officio*. Held also, that a commitment by

CONCERTED COMMISSION.

a justice of the peace under 5 Geo. 2, c. 30. s. 14 of the bankrupt "until he shall be discharged by due course of law" is bad: *Ex parte Page*, 1 Barne and Alderson 568.

5. Commitment of bankrupt on a question, whether he had communicated to his assignee, according to the direction of the commissioners, where and how persons named by him as debtors were to be found, and if not, why not answered—he had not, and could state no reason why, illegal; and the bankrupt discharged by Habeas Corpus. The commissioners having no power to delegate their authority to examine, and the bankrupt, no consent appearing on the warrant, not being bound to submit, or to state why he did not; but had they personally required the information from him, which he must be supposed capable of giving, his answer—that he would not or could not, however direct, not being satisfactory, would justify commitment. *Cassidy's case*, 19 Ves. 324.

CONCERTED ACT OF BANKRUPTCY.

See *Act of Bankruptcy*.

CONCERTED COMMISSION.

See *Affidavit*, 4.

Act of Bankruptcy, 2.

1. If a commission is taken out upon an act proved at the trial of an issue to have been concerted with the petitioning creditor and the solicitor, the court will supersede it, and will

CONSIDERATION.

not direct another issue to try the validity of the commission, with liberty to prove other acts. Ex parte *Prosser re Brown*, 1 Buck C. B. 77.

2. Concerted commission superseded at the costs of the solicitor and petitioning creditor. Ex parte *Prosser re Brown*, 1 Buck C. B. 77.

3. The court will not supersede a commission that is not otherwise concerted, merely on the ground that it issued at the instance of the bankrupt. Ex parte *Staff re Saunders*, 1 Buck C. B. 249.

4. The court will not support a concerted commission, even though it be for the benefit of the creditors that it should proceed. Ex parte *Brookes re Bentley*, 1 Buck C. B. 257.

5. A commission may have all the legal requisites for its validity, yet, if it be sued out at the instance of the bankrupt, the court will on that ground alone supersede it. Ex parte *Staff re Saunders*, 1 Buck C. B. 431.

6. Semble, where the circumstances are such as to make the bankrupt the agent of the petitioning creditor, such a commission would be bad at law, on the ground of an implied concert on the part of the petitioning creditor. Ex parte *Staff re Saunders*, 1 Buck C. B. 431.

CONSIDERATION.

See *Action*, 9.

Voluntary Bond, 1.

1. If by giving an acceptance a debt be constituted, which may be

COSTS.

proved under a commission, that is as much a consideration as if the value of the bill had actually been paid in money. Ex parte *Greenwood re Whately*, 1 Buck C. B. 239.

CONSIGNMENT.

See *Lien*, 1.

CONSPIRACY.

See *Fraudulent Commission*, 3.
Proceedings, 4.

1. If it appear that persons have conspired together in the issuing of a fraudulent commission, the Lord Chancellor will direct the necessary documents to be laid before the Attorney General, with a view to the institution of criminal proceedings against the parties. Ex parte *Emery re Chard*, 1 Buck C. B. 422.

CONTRIBUTION.

See *Assignee*, 10.

COPYHOLD ESTATES.

1. The commissioners may except the copyhold estates of the bankrupt out of the bargain and sale, and convey them directly to purchasers. Ex parte *Harvey re Humphreys*, 1 Buck C. B. 493.

CORPORATION.

See *Proof*, 21.

COSTS.

See *Affidavit*, 10.

Assignee, 5, 7.

Concerted Commission, 21.

COSTS.

Certificate, 8.
Solicitor, 4, 5.
Petition, 4, 6, 9.
Mortgagor and Mortgagee,
 2, 5, 8, 9, 10.
Baron and Feme, 1.
Fraudulent Commission, 2.
Mortgage, Equitable, 2, 3.
Action, 13.
Solicitor's Bill of Costs, 1.
 2, 3.
Pleading, 11.
Sheriff, 1.

1. Bankrupt presenting an unnecessary petition, his solicitor ordered to pay forty shillings costs. *Ex parte Parker re Parker*, 1 *Buck C. B.* 313.

2. A judgment creditor having been directed to try the validity of the commission, succeeded upon the trial. The petitioning creditor directed to pay the costs of superseding the commission and of the petition.—*Ex parte Heming re Powell*, 1 *Buck C. B.* 350.

3. Costs are not given upon an appeal from the deliberate judgment of the commissioners; but the rule does not extend to *ex parte* cases, where the opposite side has not the opportunity of being heard, and the commissioners have not exercised a deliberate judgment. *Ex parte Greenway re Burgess*, 1 *Buck C. B.* 412.

4. The statute 39 and 40 *Geo. III.* c. 104, extends to assignees of a bankrupt; and therefore, where a plaintiff as assignee recovered less than £5, the court ordered a suggestion to be entered on the record, to deprive

COVENANT.

the plaintiff of costs; but defendant having given notice of his intention to dispute the petitioning creditor's debt, &c. (which was proved at the trial) it was holden that the plaintiff was entitled to the costs thereby occasioned, and the court ordered the suggestion to be entered accordingly. *Ward v. Abrahams*, 1 *Barne and Ald.* 367.

5. The assignees of a bankrupt, when nonsuited, are not entitled under 49 *Geo. III.* c. 121, s. 10, to the costs of proving, after notice to do so, the commission, trading, act of bankruptcy, and petitioning creditor's debt. *Atkins v. Seward*, 1 *Brod. and Bing.* 275.

COURTS OF LAW.

1. A court of common law may assess damages upon a count for interest in a declaration, by a reference to the master, without the intervention of a jury. *Eyre v. Bank of England*, 1 *Buck C. B.* 419.

COVENANT.

See *Assignee*, 8.

Lease, 1, 2, 6.

Deed of Separation, 1.

Lessor and Lessee, 2.

1. A covenant in an indenture, made between A and B, (assigning to A £4350, payable under articles of agreement by J. S to B, by instalments), that in case the said sum, or any instalment thereof should not be paid to A, at the times and in the manner provided for by the articles, B

DEEDS.

would, upon demand, pay to A the said sum, or so much thereof as should not be paid at the times, &c. was held not to be discharged by the bankruptcy of B, as to any instalments accruing due after the bankruptcy; this not being a matter proveable under the commission either by s. 9, or s. 17 of 49 Geo. III. c. 121. *Hoffman v. Foudrinier*, 5 Maule and Selw. 21.

COW-KEEPER.

See *Trading*, 2, 3.

CREDITOR.

See *Evidence*, 11.

CROWN.

See *King*, 1.

DAMAGES.

See *Courts of Law*, 1.

DEALER AND CHAPMAN.

See *Commission*, 12.

DEBTS.

See *Order and Disposition*, 2.

DECEASED TRADER.

1. The act of the 47 Geo. III, sess. 2, c. 74. applies only to persons who were traders at the time of their decease, and not to persons who have left off trade before they died. *Hitchin v. Bennett*, 4 Mad. 180.

DEEDS.

See *Marriage Settlement*.
Fraudulent Conveyance.
Voluntary Conveyance.
Deed of Separation.

DEED OF SEPARATION.

DEED OF COMPOSITION.

See *Principal and Surety*, 2.
Proof, 22.

DEED OF SEPARATION.

1. By deed of separation the husband (a trader liable to the bankrupt laws) covenants with a trustee for the wife, in consideration of being indemnified from all debts and engagements that might be contracted by her during the separation, to release his remainder in fee in certain estates of which he was tenant for life, with remainder to the wife for life, with remainder to the issue of the marriage, with remainder to himself in fee to such uses, &c. as the wife shall by deed or will appoint; with power to the wife to revoke the uses of such deed or will. The wife executes the power by deed, which she retains in her possession, and afterwards alters and re-executes. Held first, that the covenant, although entered into on occasion of a separation between husband and wife, was yet binding in equity, being made to a third party. Secondly, that it might be supported against creditors under the statute of *James*, by the consideration of indemnity against the wife's debts and engagements. Thirdly, that the deed of appointment containing no power of revocation, although it was contained in the instrument creating the original power, the re-execution was void, and the original appointment therefore was de-

DEPOSIT, A MERE

creed to be carried into execution. *Worrell v. Jacobs*, 3 Mer. 256.

DELAYING CREDITORS.

See *Act of Bankruptcy*, 7, 9.

DEL CREDERE COMMIS-

SIGN.

See *Set off*, 6, 8, 10.

DELIVERY.

See *Lien*, 1.

DEMURRER.

See *Certificate*, 6.

1. On demurrer, held, that a bankrupt cannot file a bill against a debtor to his estate, on the ground of the invalidity of the commission, and of collusion between his assignees and the debtor, the proper course being an action to try the validity of the commission, or a petition to remove the assignees. *Hammond v. Atwood*, 3 Mad. 158.

DEPOSIT.

See *Proof*, 6.

See *Lease*, 5.

Bills of Exchange, 9, 15, 16, 17.

Partners, 16, 22.

1. If a customer deposits a lease with his bankers, without stating for what purpose it is left, and afterwards becomes bankrupt: Held, that the bankers have not a lien on it, in order to secure the payment of their general balance, and that the assignees may maintain an action of trover for its recovery. *Lucas and*

DIVIDENDS.

others v. Dorrien and others, 1 Moore 29.

DETAINER.

See *Arrest*, 1.

DEVASTAVIT.

See *Executor*, 2.

DISCOUNT.

See *Bills of Exchange*, 2, 3, 4, 15, 16.

Proof, 24.

Relation to the Act of Bankruptcy, 2.

DISSOLUTION OF PARTNERSHIP.

1. A, on his own proposal, takes B into partnership for five years, in consideration of £500 paid, and £550 secured: soon afterwards, A procures a commission of bankrupt against B, and thereupon dissolves the partnership; the security decreed to be delivered up and the payments refunded, allowing for the time the partnership continued. *Hamill v. Stokes*, 1 *Wilson's Exch. Rep.* 80.

DIVIDENDS.

See *Bankers to the Estate* 1.

1. Upon a petition to be paid a dividend, the debt cannot be disputed. *Ex parte Lanley re Grinstead*, 1 *Buck C. B.* 456.

2. Upon a petition by a creditor for his dividend, the assignees can only resist the payment upon grounds, as they could have defended an action previous to the 49 Geo. III. c. 121. *Ex parte Hodges re Motreux*, 1 *Buck C. B.* 524.

DOCKET.

3. Assignees not justified in delaying payment of dividends, on the ground, that notice has been given them by a third person of a claim upon the dividends, no petition having been presented by such claimant within a reasonable period after such notice of a claim: *Ex parte Alsopp re Dicken*, 1 *Mad.* 603.

4. Certain stock standing in the name of the bankrupt, the dividends of which had not been claimed, was, under the 56 Geo. III. c. 60, transferred to the commissioners for the reduction of the national debt. The assignee of the bankrupt, by petition under the act, claimed the stock as part of the bankrupt's effects. Another person by petition claimed the stock, insisting that the bankrupt was a trustee for him. A reference was directed to the master to ascertain whose stock it was, and in the meantime the stock was directed to be transferred into the name of the Accountant-general: *Ex parte Gillet*, *Ex parte Bacon*, 3 *Mad.* 28.

DOCKET.

See *Commission*, 2, 5.
General Orders, 2.

1. A solicitor having struck a docket/ordered, within the regular time, the commission to be sealed, but through the mistake of his clerk, the fees were not paid to the secretary. Another solicitor then struck a docket against the same bankrupt. The Lord Chancellor held, that the mistake of the clerk was a suffi-

DORMANT PARTNER.

cient ground for the court to uphold the first commission, as the general order, 29th December, 1806, ought not to be construed too strictly. *Ex parte Slatford re Dunkin*, 1 *Buck C. B.* 1.

2. Practice of the bankrupt-office requiring only one of several joint petitioning creditors to make the affidavit, and give the bond to the great seal. *Ex parte Morton re Morton*, 1 *Buck C. B.* 44.

3. Where partners are petitioning creditors, the practice is for one of them to make the affidavit of the debt, and the partner making the affidavit alone, enters into the bond to the great seal. *Ex parte Peele re French*, 1 *Buck C. B.* 457.

4. Where a docket was struck on the 10th, but the commission was not bespoken till the 15th of the same month, on which day another creditor applied to strike a docket, but after the first commission was bespoken. Held, that the first creditor's right to have his commission issue, was preferable to that of the second. In the matter of *Graham*, 1 *Buck C. B.* 529.

DORMANT PARTNER.

See *Partner*, 31, 33, 34, 36, 37.

1. Whether the property of a dormant partner in the possession of the visible partners is within the statute, 21 Jac. II. c. 19. s. 11. *quære*. *Ex parte Wilson re Colbeck*, 1 *Buck C. B.* 48.

2. Option of creditor, without notice of a dormant partner, to consider himself a joint or sepa-

ENEMY.

rate creditor. *Ex parte Hodgkinson*, 19 Ves. 294.

DROVER.

See *Trading*, 2, 3.

ELECTION.

See *Petitioning Creditor*, 1.

Lease, 3, 4, 7.

Mutual Debts & Credits, 3.

1. An attachment of the bankrupt, after the commission had issued, for non-payment of money into court, under an order in a suit instituted against him before the commission issued, is not such an election to proceed against the person of the bankrupt as will satisfy the debt.—*Ex parte Benjamin re Phillips*, 1 Buck C. B. 41.

2. Whether an attachment of a bankrupt, after the commission has issued for non-payment of money to the party under an order instituted against him before the commission issued, is such an election to proceed against the person of the bankrupt as will satisfy the debt, *Quære*. *Ex parte Benjamin re Phillips*, 1 Buck C. B. 41.

3. Where the plaintiff, in an action against a bankrupt, makes his election to proceed under the commission, the defendant is entitled to have some entry or suggestion, recording the election, put on the record. *Kemp v. Potter*, 6 Taunt. 549.

ENEMY.

See *Alien Enemy*.

ESTOPPEL.

ENEMY'S COUNTRY, RESIDENCE IN

See *Petitioning Creditor*, 6.

EQUITABLE MORTGAGE.

See *Mortgagor and Mortgagee*.
Mortgage Equitable.

EQUITY OF REDEMPTION.

See *Auction Duty*, 1.

Mortgagor and Mortgagee.

ESTATE.

See *Assignee*, 8.

Bankrupt, 2.

1 The court will not, at the petition of the bankrupt, direct inquiries as to the management of the estate, if he have not a pecuniary interest therein. *Ex parte Harrison re Harrison*, 1 Buck C. B. 246.

2. Creditors who wish to have the accounts of the assignees taken, must first apply to the commissioners for that purpose, and if they miscarry in their judgment, or refuse to act, the creditors may then petition the court to have the accounts taken. *Ex parte Brocksopp re Kensington*, 1 Buck C. B. 304.

ESTOPPEL.

1. If the assignees of a bankrupt, suing the petitioning creditor for money of the bankrupt's which he has got into his hands, accidentally shew that, on a statement of accounts between the defendant and the bankrupt, the balance due from the latter is less than sufficient to sustain the commission, the defendant ne-

EVIDENCE.

vertheless is estopped from taking advantage of that fact to defeat the action, by his affidavit of debt made to support the commission. *Harmer v. Davis*, 7 Taunt. 577.

EVIDENCE.

See *Affidavit*, 2, 9.

Act of Bankruptcy, 3.

Assignee, 13.

Certificate, 12.

Order and Disposition, 7, 11.

Practice, 15.

Trading, 9, 11.

Usury, 1.

Commission, 14.

1. Upon a petition to supersede a commission, the bankrupt's examination before the commissioners is evidence to shew the petitioner is not a creditor, although the petitioner was not present at the examination. *Ex parte Fowles re Nickson*, 1 Buck C. B. 98.

2. An examination, taken before the commissioners upon an inquiry, is not evidence to expunge a creditor's proof, who was not party to the inquiry.—Nor is it evidence to ground an order for an inquiry as to the validity of the proof. *Ex parte Coles re Coles*, 1 Buck C. B. 242.

3. Examinations are not evidence against a person not a party to the inquiry, but they may furnish a ground for directing an examination of the persons in his presence. *Ex parte Scott re Nias*, 1 Buck C. B. 280.

4. Where no notice has been given to dispute the bankruptcy in an action by the assignees, it ought to appear from the depo-

sition, that the petitioning creditor's debt was due at the time of the act of bankruptcy. *Lawson and others, assignees of Shiffner, v. Robinson*, 1 Starkie N. P. Rep. 456.

5. In an action by the assignees of a bankrupt, where no notice has been given to dispute the bankruptcy, a deposition, stating that the bankrupt absented himself, and that the bankrupt had admitted that he absented himself for the purpose of avoiding his creditors, but not specifying the time of such admission, is not *prima facie* evidence to prove the act of bankruptcy. *Marsh and another, assignees of Harrison and others v. Meager*, 1 Starkie N. P. Rep. 353.

6. On a petition by a person found a bankrupt, to supersede his commission, on the grounds that he has not committed an act of bankruptcy, the court, though there is no affidavit on the other side in support of the commission, or notice that the proceedings would be produced, will look into the proceedings to see if there is an act of bankruptcy. *Ex parte Vypond*, 1 Madd. 624.

7. In an action by the assignees of a bankrupt, where the proceedings under the commission are read by virtue of the statute, a deposition, in which it is stated, that the deponent saw the bankrupt execute an assignment of all his effects, &c. is sufficient evidence of the act of bankruptcy, without producing the assignment. *Kay v. Stoad*, 2 Starkie 200.

EVIDENCE.

8. Entries in bankers' books, not proved to have been communicated to the customer, not evidence against, but may be for him. *Ex parte Pease, Townsend, Farley, Daniel, and Banks re Boltero*, 19 Ves. 25.

9. The defendant, (in an action at the suit of the assignee of a bankrupt), had attended a meeting of the commissioners, and exhibited the account between him and the bankrupt, and afterwards made a part-payment to the plaintiff on that account. Held, in an action for the balance remaining due, that this was *prima facie* evidence, as against the defendant, that the plaintiff was assignee, and that it was not necessary to produce the proceedings under the commission, the defendant not having given notice of his intention to dispute the bankruptcy. *Dickinson v. Coward*, 1 Barne and Ald. 677.

10. In an action against the assignees of a bankrupt and their servants, the proceedings may be read in evidence, where no notice has been given under the statute of the plaintiff's intention to dispute the bankruptcy, although there are other defendants on the record besides the assignees.—*Gilman v. Cousins*, 2 Starkie 182.

11. Upon an issue to try whether an act of bankruptcy has been committed, a creditor is incompetent as a witness, although he has not proved under the commission. Quere, whether a commissioner under the commission is a competent witness to prove the bankruptcy. *Crooke v. Edwards*, 2 Starkie 302.

12. Upon a question whether A, after executing a conveyance of property to trustees for the benefit of his wife, had the disposition of the property; evidence of his making an assignment of it is not admissible against the trustees, unless they were privy to it, or unless the property were delivered, and the assignment acted upon. Semble a letter written by an attorney to his client, and produced with the client's signature indorsed upon it, it is evidence against the client. Where the question is as to the solvency of a party at a particular time, the general result, as collected from sufficient sources, may be given in evidence. And semble the accounts rendered by a bankrupt of his affairs to the commissioners are competent sources. *Assignees of Meyer v. Seston*, 2 Starkie 274.

13. In an action against several defendants, as partners, for goods sold, some of whom pleaded bankruptcy, and others the general issue. Held, that after the plaintiff had closed his case, and the bankrupt defendant proved the bankruptcy, one of the bankrupts could not be admitted as a witness to show a dissolution of the partnership prior to the delivery of the goods. *Emmett v. Bradley*, 1 Moore 882.

14. Where a person produces notes issued by bankers since become bankrupts, and proves that payments were made to him to that amount, in notes of that bank, shortly before the bankruptcy, that is evidence to be left to a jury, whether he did not hold

EVIDENCE.

these identical notes at the time of the bankruptcy. *Moore v. Wright*, 6 *Taunt.* 517.

15. In an action for maliciously suing out a commission of bankrupt against the plaintiffs, "surviving partners of *Edmund Darby*," as the fact was an averment that the commission was not superseded, is not proved by a writ of supersedeas to supersede a commission against the plaintiffs, "surviving partners of *Edward Darby*." *Matthews v. Dickenson*, 7 *Taunt.* 399.

16. The defendant agrees to guarantee the plaintiff against any loss in case his son shall become bankrupt; plaintiff alleges in his declaration, that his son has become a bankrupt; he is bound to show that a commission of bankrupt has been sued out. *Bulkeley v. Lord*, 2 *Starkie* 406.

17. Where three of five joint contractors had pleaded, that, after the premises and cause of action, they became bankrupts; and the plaintiffs proved their debt under the commission, and elected to take the benefit thereof, and issue joined on the proof under the commission, a question arising whether the other two defendants had continued partners to the time of the contract, though the evidence on the issue on the bankrupt's plea is for them, they are not entitled to a verdict in the midst of the cause, that they may be called as witnesses for the other defendants. Especially if the defendants call witnesses. *Emmet v. Butler*, 7 *Taunt.* 599.

18. A writ of supersedeas, re-

EXAMINATION.

citing that a commission of bankruptcy issued on a day certain, is evidence to show that such a commission issued on that day. *Ger- vis and others v. the Company of Proprietors of the Grand Western Canal*, 5 *Maule and Selw.* 76.

19. Commissioners of bankruptcy, as they cannot issue subpoenas, must, upon questions of fact coming before them, collaterally proceed by affidavit. *Ex parte Thistlewood*, 19 *Ves.* 250.

20. In an action of trover, brought by the assignee of a bankrupt for a rick of bark, and of which the bankrupt was the reputed owner, a witness may be asked what was the reputation of the neighbourhood to whom the rick belonged at the time of the bankruptcy, if it appear that the bankrupt had exercised repeated acts of ownership over it previous to that time. *Oliver v. Bartlett*, 3 *Moore* 592.

21. The petitioning creditor's debt, trading, and act of bankruptcy, are sufficiently proved by the production of the commission, and the proceedings under it, in a case where the defendant is not named as assignee on the record, provided no notice under *Sir S. Romilly's act*, 49 *Geo. III. c. 121, s. 10*, has been given by the plaintiff. *Rowe v. Lant*, 1 *Gow.* 24.

EXAMINATION.

See *Evidence*, 1, 2, 3.

Bankrupt, 1.

Commissioners, 2, 4.

Felony, 1.

Commitment, 1, 2, 4, 5.

EXECUTOR.

1. It is in the discretion of the Lord Chancellor to permit or refuse a defendant at law to have copies of his examination before the commissioners. Upon this petition, the examinations having been laid before the Lord Chancellor, he refused the application. *Ex parte Chater re Crosby*, 1 Buck C. B. 290.

EXCHANGE OF SECURITIES.

See *Bills of Exchange*, 14.

EXCHEQUER BILLS.

See *Partners*, 16; 17, 19.

See *Practice*, 5.

EXCEPTIONS TO MASTER'S REPORT.

1. Exceptions filed to the master's report, under a reference in bankruptcy, upon petition for liberty to except. *Ex parte Thistlewood*, 19 Ves. 236.

EXECUTOR.

See *Proof*, 12.

Petitioning Creditor, 3, 5.

1. If an executor, who is directed to carry on his testator's partnership trade, exceed his authority, by employing the assets in the trade to an extent not warranted by the will, and the surviving partner and the executor become bankrupt, the excess of the assets so employed may be proved by the executor under their commission. *Ex parte Richardson re Hodson*, 1 Buck C. B. 202.

2. Specific legacy to an exe-

EXTENT.

cutor, who afterwards becomes bankrupt, and commits a *devastavit*. The subject of the specific bequest being sold by his assignees:—Held, the product in their hands not specifically liable to make good the *devastavit*, in favor of the parties beneficially entitled under the will, but that such parties are only entitled to prove to the amount of the *devastavit*. *Geary v. Beaumont*, 3 Mer. 431.

EXECUTION.

1. Where a sheriff, by virtue of a *fieri facias*, took in execution goods of a person who, after the seizing, and before the sale of them, became bankrupt, and the assignees gave the sheriff due notice of the bankruptcy, and at the same time required him not to sell:—Held that the sheriff, having applied to the plaintiff in the action for an indemnity for proceeding to sale, as well as to the assignees for returning *nulla bona*, was, on refusal of such indemnity by both parties, justified in selling the goods, and the court will interfere to protect him. *King v. Bridges*, 1 Moore 43.

EXTENT.

1. The court, on motion for an *amoveas manus*, where the sheriff had seized debts due to the bankrupt at the test of the writ, and paid to his assignees under a commission of bankruptcy, issued after the writ of extent, and before the taking of the inqui-

FOR HOLDERS.

1. Where a sheriff, by mistake, returned to a *feri facias*, that he had a sum in his hands to be paid to the plaintiffs, when in truth he had not the sum in question, having been paid (through want of caution in the sheriff's officer) to the solicitor of a commission of bankrupt issued against the defendant, under which commission one of the plaintiffs was an assignee. Held, that this plaintiff knowing of such payment, and having omitted to make an early objection to it, the sheriff was absolved from paying to the plaintiffs the sum mentioned in his return. *Tomlinson and White v. Skynn*, 2 Brod. and Bing. 77.

2. Where a commission of bankrupt has been issued against a defendant, and his assignees claim the property, and the plaintiff refuses to indemnify the sheriff, the court will enlarge the time for sheriff's returning the *fieri facias*, until the next term. But there must be a rule to shew cause. *Ledbury v. Smith*, 1 Chitty. 294.

FORECLOSURE

1. The first step in the process is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the problem.

1. A bill of foreclosure against the assignees of a bankrupt mortgagor, before the execution of the bargain and sale by the commissioners, will not be dismissed, on the ground, that the assignees have not any interest that can be the subject of a foreclosure. *Bainbridge v. Pinkhorn*, 1 Buck C. B. 125.

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See *Bankrupt*, 4.

1. A bankrupt who has surrendered to his commission, is not guilty of felony within 5 Geo. I. c. 80; though, he refuse to answer questions concerning his property. *The King v. Page*, 1 *Brod. and Bing.* 308; *Ex parte* [not quoted to roles named].
FERI FACIAS, to bring a party into court.
See Practice, 93, 103.

FRAUD.

FOREIGN COURTS.

1. To a suit instituted in the Dutch colonial court, at Demarara, for the recovery of the balance of an account for sugars, consigned to, and received by the defendant and his partner in London, the defendant pleaded his bankruptcy in England, (of which the plaintiffs had notice, but had not proved their debt under it), and certificate. Held, that the bankruptcy and certificate were a discharge of the debt. *Odwin v. Forbes*, 1 Buck C. B. 57.

FRAUD.

See *Supersedeas*, 9.
Partners, 29.

1. A married infant, by the solicitation of himself and his brother, an attorney, obtained a transfer of stock from trustees a few months before he came of age, and after coming of age, received a transfer of the residue of the stock to which he was entitled: and then assigned all his property to two creditors, who had struck a docket against him, they agreeing not to prosecute the docket. Held, to be a fraud in the infant, and that he recognized the payment when of age; and therefore, and because the agreement was contrary to the spirit of the bankrupt laws, such assignees held not entitled to call for a repayment of the money paid during the infancy. *Cory and others v. Gertchen*, 2 Mad. 40.

2. A, a trader in embarrassed

FRAUDULENT COMMISSION.

circumstances, being indebted to plaintiff for money lent and goods, plaintiff promised to induce A's creditors to agree to a composition, on condition of A's giving the plaintiff a promissory note for the money lent, signed by A and another, as security; the note was given by A, and signed by the defendant as security; the plaintiff and A agreed to keep the matter a secret from A's creditors, and the plaintiff endeavoured, but in vain, to accomplish a composition with them. Held, that the transaction was fraudulent and void, and that plaintiff could not recover on the note against the defendant. *Wells v. Girling*, 1 Brod. and Bing. 447.

3. The defendants being unable to procure payment for barley which they had sold, and suspecting the vendee to be in bad circumstances, repurchased the barley by a third person, and in his name, a short time before the bankruptcy of the vendee, who was not privy to the contrivance of the defendants. Held, that this was no fraud within the bankrupt laws. *Harris v. William Peter Lunell*, 1 Brod. and Bing. 390.

4. The case *ex parte Stephens* (xi. Ves. 24.) rests upon the fraud. *Ex parte Blagden*, 19 Ves. 467.

FRAUDULENT COMMISSION.

See *Agreement*, 3.
Dissolution of Partnership, 1.

1. In a case where an attorney

FRAUDULENT COMMISSION.

has obtained from a young man about to be admitted to become his partner in business for a certain term, and to pay him, as a consideration, a considerable sum of money, a part to be paid on the execution of the articles, and the remainder by yearly instalments. If during the term, the attorney sue out, in character of a creditor, a commission of bankruptcy against the partner, so having become his partner, whereby, on his being declared bankrupt, the partnership is necessarily dissolved; the court will not only not permit him to sue for the instalments accruing due afterwards, but will order him to refund the money already received by him in consideration of the partnership, except as far as shall be commensurate with the period of the actual duration of the partnership. So also if the attorney has himself since become bankrupt, and assigns chosen.

Nor will the court allow a bona fide creditor, to whom the bond to pay the instalments has been assigned as a security for his debt, to put it in suit; because all equities follow the bond in such hands, and they will order the bond to be delivered up to be cancelled. *Hunt v. Stokes*, 4 Price 131.

2. In such a case the Lord Chief Baron allowed the plaintiff costs, and refused them to all the parties actually defending the suit. *S. G.*

3. Commission of bankruptcy for the mere purpose of giving a certificate, a conspiracy liable to Vol. I. Xx

FRAUDULENT PREFERENCE.

indictment on information. Ex parte *Crothorn*, 19 Ves. 200.

FRAUDULENT CONVEYANCE.

See *Specific performance*, 1. *Act of Bankruptcy*, 10.

1. Whether a deed of grant of personal chattels, containing a stipulation for the grantor's continuing conditionally in possession, is for that reason fraudulent, and an act of bankruptcy, quere. *Hartley v. Smith*, 1 Buck C. B. 368.

2. Where a trader made a fraudulent assignment of his tavern and stock, accompanied with possession, and changed his residence from Westminster to Paddington, and a commission of bankrupt having issued against him, the assignee brought trespass against the messenger for taking possession of the tavern and goods: held, that however fraudulent the deed as against creditors, yet unless an act of bankruptcy was proved to sustain the commission, the assignee might recover on her possession. *Young v. Wright*, 6 Taunt. 540.

FRAUDULENT PREFERENCE.

1. A trader may make a transfer of his goods on the eve of bankruptcy, to a creditor who compels him so to do by any threat; but a voluntary and fraudulent preference is an act moving from the trader, whereby he elects to favor a particular cre-

GAMING.

ditor. *Reed v. Ayton*, 1 *Holt* 503.

2. Where the creditor acts adverse to the views and wishes of the trader, and by urgency and importunity obtains a transfer of property to cover his liability upon a bill then running, (which bill he had discounted), although such transfer be made on the eve of bankruptcy, it will not be a fraudulent preference on the part of the trader. *Arbouin v. Hanbury*, 1 *Holt* 575.

FRAUDULENT SALE OF DEPOSIT.

See *Partners*, 16, 17.

FRAUDULENT SETTLEMENT.

See *Fraudulent Conveyance*.

FRACTION OF A DAY.

See *Act of Bankruptcy*, 8.

FRIENDLY SOCIETIES.

1. The 33 *Geo.* III. c. 54, s. 10, only applies to cases where the officer of the friendly society has, by virtue of his office, been intrusted with the monies and effects of the society. *Ex parte Buckland re Thick*, 1 *Buck C. B.* 214.

GAMING.

See *Certificate*, 11.

1. Where the defendant pleads his certificate in bar, the plaintiff is at liberty to give evidence of gaming at Nisi Prius, in order to vitiate the certificate. The 12th and 7th sections of the 5 *Geo.* II.

GAZETTE.

c. 30, are to be construed as if they were incorporated; but the plaintiff must confine his evidence to one act, and elect whether he will give evidence of one loss amounting to £5, or of several losses amounting to £100. *Hughes v. Morley*, 1 *Holt* 520.

2. The clause in the 12th section of statute 5 *Geo.* II. c. 30, depriving bankrupt from his certificate in the case of losses at play, is to be considered as a qualification restraining the operation of the 7th section, which makes the certificate a bar; and evidence of such loss may be given in a court of law, on the similitude to the general plea in bankruptcy. *Hughes v. Morley*, 1 *Selwyn* and *Barne* 22.

GAZETTE.

1. Notice in the Gazette is not alone sufficient to put debts in the ordering and disposition of the person, to whom the notice directs them to be paid. *Ex parte Wheeler re Mallam*, 1 *Buck C. B.* 30.

2. If there be a *bona fide* intention to prosecute a commission, an advertisement in the Gazette, of the adjudication of the commissioners, may be dispensed with; as, where notice of the adjudication in a country commission was given at the bankrupt office, on the 28th day, in order to obtain a certificate for the purpose of inserting the adjudication in the Gazette, it was held to be sufficient to support the commission. *Ex parte Soppitt re Roach*, 1 *Buck C. B.* 81.

INDEMNITY.

3. Insertion of bankruptcy in the Gazette, suspended only, where, on inspection of the proceedings, no bankruptcy found; or, under a country commission to give the opportunity of producing the evidence. Under the circumstances, an issue directed to try the bankruptcy, which had not appeared in the Gazette; all proceedings under the commission being stayed. *Ex parte Tarleton*, 19 Ves. 464.

GENERAL ORDER.

See *Orders General*.

GUARANTEE.

See *Proof*, 5.

HABEAS CORPUS.

See *Commitment*, 4, 5.

1. The Lord Chancellor can issue the common law writ of Habeas Corpus, in the vacation time. *Crowley's case*, 1 Buck C. B. 264.

IMPERTINENCE.

See *Slander and Impertinence*, 1.

INDICTMENT.

1. In an indictment against a bankrupt, he was charged in feloniously making default in not submitting to be examined.—*Quære*, whether this is sufficient, without charging him with a refusal to surrender and submit to examination. *The King v. Page*, 3 Moore 656.

INDEMNITY.

See *Execution*, 1.
Sheriff, 1.

ISSUE.

INDORSEMENT.

See *Bills of Exchange*, 15, 16, 17, 20, 21.

INFANT.

See *Petitioning Creditor's Debt*,

2.

Fraud, 1.

INFANT TRUSTEE.

See *Jurisdiction*, 6.

INJUNCTION.

See *Solicitor*, 1.

1. Injunction granted to restrain an action of ejectment brought by a bankrupt, at the instigation of the petitioning creditor, and another creditor to recover the possession of premises sold under a commission acquiesced in for seven years. *Ex parte Grant re Richardson*, 1 Buck C. B. 90.

ISSUE.

See *Affidavit*, 4.

Concerted Commission, 1.

Certificate, 9, 11.

1. Upon an order to proceed to trial upon two issues to try the validity of the commission, the plaintiff to give notice in writing to the bankrupt of the acts intended to be relied on at the trial. Held, that the petitioner in his notice must specify the acts relied on, the times when they were committed, and the witnesses who will be called to prove them. *Ex parte Bogen re Bogen*, 1 Buck C. B. 137.

2. In directing an issue, the court will not order the exami-

INTERPLEADER.

nation of persons at the trial, who by the rules of the courts of law could not be examined without such order, except sometimes in cases where the facts in dispute rest only on the knowledge of the plaintiff and defendant. Ex parte *Dister re Thompson*, 1 *Buck C. B.* 234.

3. The practice of the court is, where the case requires it, to direct the bankrupt to be examined upon an issue to try the validity of the commission. Ex parte *Staff re Saunders*, 1 *Buck C. B.* 431.

4. Where the petitioner swore positively to a debt, and was contradicted by the bankrupt, there being no other evidence, an issue was directed, at the trial of which the bankrupt and the petitioner were to be examined. Ex parte *Williamson re Smith and Hampshire*, 1 *Buck C. B.* 546.

INSOLVENCY.

See *Joint Creditor*, 1,

INSURANCE.

See *Order and Disposition*, 1.
Set off, 4, 8, 10, 11, 12.

INSURANCE BROKER.

See *Insurance*.

INTEREST.

See *Petitioning Creditor's Debt*, 3, 4.
Partners, 19.

INTERPLEADER.

1. A debtor of the bankrupt cannot support an interpleading bill against the bankrupt and his

JURISDICTION.

assignees. *Harlow v. Crowley*, 1 *Buck C. B.* 273.

JOINT ESTATE.

See *Proof*, 9.

JOINT CREDITOR.

See *Surplus*, 1.

Petitioning Creditor, 1.

Partners, 2, 3, 4, 5, 26.

Outlawry, 1.

Dormant Partner, 2.

Proof, 20, 32.

1. Where a commission of bankrupt had issued against one of two partners, and the other partner was insolvent, but no commission had issued against him. Held, that the joint creditor could not come in competition with the separate creditors, and receive a dividend out of the separate estate of the bankrupt. Ex parte *Janson re Corf*, 1 *Buck C. B.* 227.

2. By deed, the stock and effects of a partnership are assigned to the continuing partner, who covenants to pay the joint debts. The partners become bankrupts. Held, that the joint creditors, not having previous to the bankruptcy accepted the continuing partner as their sole debtor, have not an election to prove against the separate estate of the continuing partner. Ex parte *Freeman re Henderson and Morley*, 1 *Buck C. B.* 471.

JURISDICTION.

See *Lessor and Lessee*, 1.

JURISDICTION.

1. The jurisdiction in bankruptcy extends to every person fraudulently engaged in issuing a commission. Ex parte *Boyle* re *Warrington*, 1 *Buck* C. B. 247.

2. Where a creditor has proved a debt, and the assignees have a demand against him, which, if determined in their favor, would give them a lien upon the dividends, they may proceed by a petition in the bankruptcy to enforce that demand. Ex parte *Timbrel* re *Brown*, 1 *Buck* C. B. 305.

3. The court has jurisdiction in bankruptcy to order the papers deposited by the bankrupt with his attorney, in actions commenced before the bankruptcy, to be delivered up to the assignees, provided they are necessary to the administration of the estate. But where assignees wanted such papers for the purpose of instituting criminal proceedings against the bankrupt, the court refused to make the order, and dismissed the petition with costs. Ex parte *Innes* re *Scott*, 1 *Buck* C. B. 337.

4. The Lord Chancellor's jurisdiction, as to acts done in the bankruptcy, is not determined by the superseding of the commission. So, after the commission is superseded, a petition will lie on behalf of a purchaser of the estates put up to sale by the assignees for the repayment of the deposit. Ex parte *Fector* re *Pitman*, 1 *Buck* C. B. 428.

5. The court has not jurisdiction in bankruptcy to order the petitioning creditor to pay the solicitor's bill up to the choice of

assignees. Ex parte ———, 1 *Buck* C. B. 475.

6. The court has not jurisdiction in bankruptcy to declare the infant heir of an assignee a trustee of the bankrupt's estate. Ex parte *Kirk* re *Gerton*, 1 *Buck* C. B. 478.

7. The Lord Chancellor has not authority to compel the commissioners to declare a party, against whom a commission has issued, a bankrupt. His authority is limited to ordering them to proceed in their judgment. Ex parte *Perrin* re ———, 1 *Buck* C. B. 510.

8. Jurisdiction in bankruptcy on the petition of persons claiming, not under the commission but against it, specific property. Ex parte *Pease*, *Townsend*, *Farley*, *Daniel*, and *Banks* re *Bolddero*, 19 *Ves.* 25.

9. Jurisdiction in bankruptcy beyond the statutes. Ex parte *Cawkwell*, 19 *Ves.* 234.

10. Upon a motion for a prohibition to the Lord Chancellor sitting in bankruptcy, it appeared that the assignees had seized, as the property of the bankrupt, a farm belonging to A. B. and had kept it a long time, and mismanaged it, and that the Lord Chancellor had referred it to the master to take the account between A. B. and the assignees, in respect of such property, and of its mismanagement; and afterwards, upon his report, had ordered a certain sum to be paid to A. B. by the assignees, the commission having been previously superseded. Held, 1st. That the jurisdiction of the Lord Chan-

JURISDICTION.

cellor sitting in bankruptcy was not confined to the period during which the commission subsisted. 2dly, That he had not exceeded his jurisdiction in ordering the master to take an account as to the mismanagement, &c. of the property, nor in making the assignees personally liable beyond the funds in their hands for such mismanagement. 3dly, That the Lord Chancellor had jurisdiction over all effects taken under the commission, as well those of strangers as of the bankrupt; and over the assignees, for all acts done by them in their character of assignees, by virtue or under cover of the commission. Held, 4thly, That in cases where the Lord Chancellor has jurisdiction generally, this court has no authority to revise his order. Held, 5thly, That no prohibition can be granted after the final order of the Lord Chancellor, unless there be an original want of jurisdiction apparent upon the face of the proceedings. *Quære*—Whether this court have authority to direct a prohibition to the Lord Chancellor sitting in bankruptcy. *Ex parte John Cowan*, 3 *Barn.* and *Ad.* 123.

11. Distinction between the jurisdiction in the court of Chancery and in bankruptcy. *Ex parte Smith*, 19 *Ves.* 473.

12. Legal and equitable jurisdiction of the Lord Chancellor in bankruptcy more by practice than authority. *Ex parte Roffey*, 19 *Ves.* 469.

13. Administration in bankruptcy both legal and equitable. *Ex parte Roffey*, 19 *Ves.* 471.

LEASE.

KING.

1. The bankrupt statutes do not bind the crown. *Ex parte Russell*, 19 *Ves.* 165.

LACHES.

See *Extent*, 3.
Partners 11.

LAND TAX.

See *Voluntary Conveyance*, 2.

LEASE.

See *Lessor and Lessee*, 1.
Assignee, 11.
Deposit, 1.
Principal and Surety, 6.

1. If a lease, containing a covenant that the lessee, "at the expiration, or other sooner determination of the term," shall take the off-going crop, is determined by the order of the Lord Chancellor in bankruptcy under the 49 *Geo. III. c. 121, s. 19*, the assignees are entitled to the off-going crop. *Ex parte Maudrel re Dark*, 1 *Buck C. B.* 88.

2. If a lease is determinable upon notice at the will of the lessor or lessee, and the lessee covenants to leave, at quitting, the hay, straw, &c. on the premises, the bankruptcy of the lessee, and the election of his assignees not to take to the lease, have the same effect with reference to the covenant, as though the lessee had quitted upon notice. *Ex parte Whittington re Adams*, 1 *Buck C. B.* 87.

3. The court is not empowered by the 49 *Geo. III. c. 121, s. 19*,

LEASE.

to determine the question of election of a lease by the assignees. Ex parte *Quantock* re *Bridger*, 1 *Buck*, C. B. 190.

4. Assignees in possession having elected not to accept the lease, an issue of *quantum dam-nificatus* was directed. Ex parte *Quantock* re *Bridger*, 1 *Buck* C. B. 190.

5. Lease containing a proviso against assignment, having been deposited by the lessee to secure a debt, ordered on the petition of the depository to be sold under the lessee's commission. Ex parte *Sherman* re *Champney*, 1 *Buck* C. B. 462.

6. When the assignees of a bankrupt enter upon and take possession of his leasehold property, they become chargeable with the covenants in the lease, although the bankrupt's effects were upon those premises, and the assignees delivered up the keys immediately after the effects were sold. *Hanson* v. *Stevenson*, 1 *Barne* and *Ald*. 303.

7. If the assignees of a bankrupt intermeddle with and assume the management of a farm, this is a sufficient election to take to the term, and makes them liable to the landlord, in consideration of their tenancy, for all mismanagement. *Thomas* v. *Pemberton*, 7 *Taunt*. 206.

8 A bankrupt having a lease of premises, and also a reversionary interest in them, the assignees sell his estate and reversionary interest in the premises. This amounts to an acceptance of the lease by the as-

LESSOR AND LESSEE.

signees. *Page* v. *Goddin*, 2 *Starkie* 309.

9. Assignees of a bankrupt lessee, though by accepting the lease they discharge the bankrupt from any claim upon him for rent, may assign the lease to an insolvent person, to exonerate themselves from future claims for rent. *Onslow* v. *Corrie*, 2 *Mad*. 330.

LEGAL ESTATE.

See *Power*, 1.

LEGACY.

1. Legacy falling to a bankrupt before allowance of his certificate, by the testator's death, pending an unfounded petition to stay it, goes to his assignees, unless the petition was presented with that object. Ex parte *Ansell*, 19 *Ves*. 208.

LESSOR AND LESSEE.

See *Lease*.

1. Petition by the lessor of a bankrupt lessee for payment of rent due after the bankruptcy, and for compensation for hay and straw sold and carried off the premises by the assignees, dismissed on the ground that the court had not jurisdiction, except in cases under the statute 49 *Geo. III.* c. 121, s. 19, or where the petition made a case for an injunction. Ex parte *Warwick* re *Haugh*, 1 *Buck* C. B. 326.

2. Covenant in a lease "that

LESSOR AND LESSEE.

"the lessee shall and may have and take a going-off crop from two third parts of the arable lands, &c. on the effluxion of the lease, or sooner determination of the said term." Lessee became a bankrupt, and his assignees, on a petition, under statute 49 Geo. III. c. 121, s. 19. refused to accept the lease.—Held, they were entitled to the off-going crop, paying rent up to the time, when possession of the premises and lease should be delivered to the landlord. *Ex parte Maundrell re Dark*, 2 *Mad.* 315.

3. One of two assignees of a lease gave a bond to the lessee, by whom the assignment was made, conditioned for the payment of the rent to the lessor, and the performance of the other covenants of the lease, and for indemnifying the lessee against the non-performance of the covenants; both the assignees of the lease having become bankrupt, and the bond having been forfeited before the bankruptcy.—Held, that the lessee could not prove, in respect of the penalty under the commission, the bond being incapable of valuation.—Held also, that he could not prove for the damages which had accrued previous to the bankruptcy, not having paid them to the lessor. Held also, that the 49 Geo. III. c. 121, s. 19, applies only to cases between the lessor and the lessee, or assignee of the lease, and not to cases between the lessee and the assignee of the lease. *Taylor v. Young*, 3 *Barn.* and *Ald.* 521.

LIEN.

LIBEL.

1. An advertisement in a public paper, strongly reflecting upon the character of an individual who has been declared bankrupt, is libellous, although published with the avowed intention of convening a meeting of the creditors for the purpose of consulting upon the measures proper to be adopted for their own security, if the legal object might have been attained by means less injurious. *Brown v. Croome*, 2 *Starkie*, 297.

LIEN.

See *Proof*, 8.

Bills of Exchange, 5, 6.

Deposit, 1.

Proceedings, 2.

Transfer of possession, 2.

Solicitor, 11.

Ship Registry Acts, 5.

1. An actual possession given to a factor by a carrier, by order of the shipper, after his (the shipper's) bankruptcy, is not such a possession as will give him a lien against the assignees, although the goods were shipped on account of the factor, and bills had been accepted by him on the faith of it.

Such an order rather operates to defeat his claim of lien, as being an act of ownership exercised by the bankrupt.

Nor is a delivery to a master of a vessel, where the consignor has written to the consignee, apprising him that he has consigned to him, and requesting him,

LIMITATIONS, STATUTE OF.

on the faith of such consignment, to accept bills, (which he accordingly accepts and pays), such a constructive delivery to a consignee as will give him a lien against the assignees. It is not within the principle of the cases which decide that an equitable right will supply the deficiency of an actual delivery, in support of a well founded lien not perfected by possession.

Letters advising of a consignment of goods to a party who has accepted bills on the faith of such consignment, are not equivalent in effect to bills of lading endorsed. *Nichols v. Clent*, 3 Price 547.

2. After judgment against the purchaser of a leasehold house and furniture, lien of the vendor upon the house and furniture, and proof under a commission of bankruptcy against the purchaser for the deficiency. *Ex parte Lord Seaforth*, 19 Ves. 235.

LIMITATIONS, STATUTE OF.

1. A promissory note is made more than six years ago, and deposited with a banker, to be delivered to the payee, on his producing a certain other note cancelled. The cause of action to the payee on the first note, accrues on receiving it from the banker, and is not barred either by the lapse of six years from the date, or by the bankruptcy and certificate of the maker which intervene between the date of the note and the time of its delivery to the payee. *Savage v. Aldren*, 2 Starkie 232.

MARRIAGE SETTLEMENT.

2. One of two joint drawers of a bill of exchange becomes bankrupt, and under his commission the endorsees prove a debt (beyond the amount of the bill) for goods sold, &c. and they exhibit the bill as a security they then held for their debt, and afterwards receive a dividend.—Held, in an action by the indorsees of the bill against the solvent partner, that the statute of limitations was a good defence, although the dividend had been paid by the assignees of the bankrupt partner within six years.—*Brandram v. Wharton*, 1 Barn. and Ald. 463.

3. Order, (*Ex parte Dewdney*, 15 Ves. 479), giving effect to the statute of limitations in bankruptcy, affirmed on rehearing.—*Ex parte Roffey*, 19 Ves. 468.

MARRIAGE SETTLEMENT.

See *Proof*, 3.

1. Upon the marriage of the bankrupt in 1802, the estate of the wife, consisting of freehold, copyhold, and leasehold lands, was conveyed to the use of the bankrupt and his heirs, who covenanted with the trustees, within six months after the marriage, to pay to them £4000, upon the trusts of the settlement. The trustees never demanded payment. In 1806 the bankrupt sold part of the freehold premises, and he and his wife levied a fine of the whole, declaring the uses of that part which was sold to the purchaser, but without making any declaration as to the remainder. In 1812, the bankrupt conveyed all

MARRIAGE SETTLEMENT.

his estates to trustees, for the benefit of his creditors. In 1813, the bankrupt covenanted that he and his wife would levy a fine to the uses declared in the deed of 1812, and a fine was levied accordingly. The wife never surrendered the copyhold premises pursuant to the settlement 1802. In 1814 the commission issued, and the husband was declared a bankrupt, his execution of the trust deed 1812, being the act of bankruptcy. The trustees of the settlement, proved the £4000 under the commission, and signed the bankrupt's certificate. Held, that the trustees on behalf of the wife and children of the bankrupt, had a lien upon the estates thereby conveyed, and remaining unsold by the bankrupt to the amount of the £4000. *Ex parte Dicken re Dicken*, 1 *Buck C. B.* 115.

2. Settlement, on marriage, of freehold estates of inheritance, and leaseholds for lives and years by a man not indebted, or intending it, in trade, to the use of himself for life, unless he shall embark in trade, and in the life of his wife, become bankrupt, and from his decease or bankruptcy, to secure an annuity for his wife; and subject thereto for his heirs, executors, &c. on his afterwards engaging in trade and becoming bankrupt, void as against his creditors. *Higinbotham v. Holme*, 19 *Ves.* 88.

3. Settlement on marriage of the wife's fortune, in case of bankruptcy of the husband, though in the form of a bond by him; but as his bond, affecting

MEMBER OF PARLIAMENT.

his property, it is void as against the creditors. *Ex parte Hodgson*, 19 *Ves.* 206.

4. By settlement previous to a marriage, there was a covenant by the husband, that his executors should pay £3000 to trustees, six months after his death; and that if he should become a bankrupt, that sum should be proveable under his commission. By a settlement made by the wife, of her property, before the marriage, contingent interests were given to the husband. The husband became bankrupt, and on petition, by the trustees, to be allowed to prove the £3000 under his commission, it was held, they could only prove to the amount of what the husband's contingent interest in the wife's property sold for under his bankruptcy. *Ex parte Young re Lark*, 3 *Mad.* 124.

MASTER'S REPORT.

See *Exceptions to Master's Report*, 1.

MEMORIAL.

See *Annuity*, 4, 5.

MEMBER OF PARLIAMENT,

See *Pleading*, 10.

1. A member of parliament had given a bond with two sureties, conditioned for the payment of the sum to be recovered in the action, pursuant to 4 *Geo. III. c.* 33, and before trial became bankrupt. The court refused to order the bond to be cancelled. *Hunter v. Campbell*, *M. P.* 3. *Barn. and Ald.* 273.

MORTGAGE EQUITABLE.

MESSENGER.

See *Solicitor*, 8.

1. A messenger cannot recover against the petitioning creditor the expenses of an unnecessary and fruitless journey to the Isle of Man, without specific authority from the petitioning creditor. *Billings v. Waters*, 1 *Starkie N. P. Rep.* 363.

MISDESCRIPTION OF BANKRUPT.

See *Misnomer*.

MISNOMER.

See *Supersedeas*, 19.

1. A commission will not be superseded on account of a misdescription of the bankrupt, if he is well known as described in the commission. Ex parte *Horsley*, 2 *Mad.* 11.

2. Order for a commission of bankruptcy against *J. Stevenson*, otherwise *Stephenson*, in an urgent case. *Stevenson's case*, 19 *Ves.* 277.

MISTAKE.

See *Partners*, 10.

Ship Registry Acts, 5.

MORTGAGE EQUITABLE.

See *Mortgagor and Mortgagee*, 2, 5, 8, 9, 10.

1. Equitable mortgage by a deposit of title deeds established, but disapproved, extended to a subsequent advance by the same person only upon clear proof that it was upon security of the

MORTGAGOR AND MORTGAGEE.

deposit; not to an advance by a third person, unless connected with some dealing with the estate, and the person holding the deposit a mere trustee, having made no advance. Ex parte *Whitbread*, 19 *Ves.* 209.

2. Equitable mortgagee by a deposit of deeds, with a writing expressing the terms of the deposit, is entitled, on a petition in bankruptcy for a sale, to have his costs out of the produce of the mortgaged property. Ex parte *Trew*, 3 *Mad.* 372.

3. Equitable mortgagee must pay the costs of his petition.—Ex parte *Warry*, 19 *Ves.* 472.

MORTGAGOR AND MORTGAGEE.

See *Annuity*, 1.

Stock, 1.

Practice, 2.

Order and Disposition, 4.

Foreclosure, 1.

Mortgage, equitable, 1, 2.

Partner, 38.

Securities, 1.

1. Mortgagee of premises to be sold under the general order, permitted to bid at the sale.—Ex parte *Du Cane re* ———, 1 *Buck C. B.* 18.

2. Costs of the application given to a mortgagee by deposit upon a petition for the usual order, there being a written instrument specifying the agreement for the deposit. Ex parte *Brightwen*, re *Wells*, 1 *Buck C. B.* 148.

3. A mortgagee having advanced to the mortgagor a further sum upon his bond—Held, that the bond, though obscurely

MORTGAGOR AND MORTGAGEE.

worded, was evidence of an agreement for a further charge upon the mortgaged premises.—*Ex parte Heurn re Hamlyn*, 1 *Buck C. B.* 165.

4. A mortgagee, who was the sole assignee and principal creditor, there being only one other creditor to a small amount, permitted to bid for the estate, subject to the approbation of the master, the mortgagee undertaking to make good the deficiency between the sum bid, and the price to be fixed by the master, in case he should not approve of the bidding. *Ex parte —*, re *Salisbury*, 1 *Buck C. B.* 245.

5. In all cases where there is an equitable mortgage by a written instrument, specifying the terms of the agreement, the mortgagee, upon the usual petition for a sale of the premises, is entitled to his costs. *Ex parte Sikes re Wilkinson*, 1 *Buck C. B.* 349.

6. It is necessary for a mortgagee of premises sold under a commission, who wishes to bid for them at the sale, to obtain leave of the court for that purpose. *Ex parte Hammond re —*, 1 *Buck C. B.* 464.

7. The bankrupt agreed with A to execute a mortgage of certain premises for the security of a debt; and he sent, in order that A might prepare the mortgage, all the title deeds except the immediate conveyance to himself. The bankrupt, being also indebted to B, took that conveyance and deposited it with him, as a security for his debt, at the same time promising to send him the re-

MUTUAL DEBTS AND CREDITS.

mainder of the title deeds. Held, that A and B had not either separately or collectively an equitable mortgage upon the premises. *Ex parte Pearse and Prothero re Price*, 1 *Buck C. B.* 525.

8. Equitable mortgagee, praying a sale of mortgaged estate, pays the costs of the petition, and of the assignee's appearance to it, not out of the produce of the mortgaged estate, but personally; but if the assignees oppose the petition on frivolous or mistaken grounds, they pay the costs occasioned by such opposition. *Ex parte Horne*, 1 *Mad.* 622.

9. Equitable mortgagee not entitled to costs on application for sale of pledge, &c. though it was owing to bankrupt that no regular mortgage was made.—*Ex parte —*, 2 *Mad.* 281.

10. On a petition for the sale of mortgaged premises by an equitable mortgagee under a written agreement for a mortgage, the petitioner is entitled to costs. *Ex parte Brighton*, 1 *Scan.* 3.

MOTION.

See *Petition*, 16.

Service of Petition, 1, 2.

MULTIFARIOUSNESS.

See *Petition*, 9.

MUTUAL DEBTS AND CREDITS.

See *Relation to the Act of Bankruptcy*, 1.

Set off, 3, 9, 16.

1. If a person, previous to his bankruptcy, deposit a bill of ex-

MUTUAL DEBTS AND CREDITS.

change with a defendant, for the purpose of raising money thereon, and an advance is accordingly made. Held, that the assignees of such bankrupt were entitled to recover the bill in an action of trover, on having tendered the money advanced, although a balance remained due from the bankrupt to the defendant, on a general account; and that this, therefore, was not a case of mutual trust or credit, within the statute 5 Geo. II. c. 30, s. 28.—*Key v. Flint*, 1 Moore 451.

2. A, at Hamburg, had dealings with B and Co. in London, and, previous to their bankruptcy, drew a bill on them for £400, which they accepted. No debt was then due from them to A, but they were afterwards indebted to him in £236:11:3, when they drew on him for £163:8:9, being the balance due from A, in case the bill for £400 had been paid. This bill was drawn on the 16th of February, and on the same day sold by them to the defendant for its full value, to be paid for on the 20th of the same month, on which day B and Co. committed an act of bankruptcy, and requested the defendant to keep the bill at the disposal of A, by whom the bill for £400 was drawn. On the 23d of February, A accepted the bill, without knowledge of the bankruptcy, and paid the amount of it, when it became due, to the defendant, on an agreement that he should resist the claims of the assignees. At that time, the bill for £400 was overdue and unpaid in the hands of A; and B and Co. were

indebted to him upon it in more than the amount of the bill in question. Held, that the plaintiffs, as assignees, could not recover against the defendant as he stood in the place of A, who was a creditor of the estate of B and Co. and that this, therefore, was a case of credit between him and the bankrupts before the bankruptcy. *Sheldon v. Rothchild*, 2 Moore 43.

3. Goods pledged expressly to secure by the produce of the sale acceptors, who have taken up and paid bills drawn on them by the owner, are released from further charge as to other bills so taken up and paid subsequently, if the amount of the original sum paid on account of the owner have been repaid to them without resorting to a sale. And if, while the goods remain in the possession of the acceptors, the owner become insolvent, and has committed acts of bankruptcy before the original pledge be entirely redeemed by repayment of the money secured by it, other advances be then made to him by them, it is not a case of mutual credit within the 5 Geo. II. c. 30, s. 28, and the assignees of the bankrupt may recover the goods in trover. But the assignees, under such circumstances, having elected to bring trover, cannot afterwards sue the defendant to recover back the original sum for which the goods had been in the first instance pledged, although paid to them after the depositor had become bankrupt.—*Birdwood v. Raphael*, 5 Price 593.

ORDERS GENERAL.

4. A guarantee against contingent damages cannot form the subject of a mutual credit under the 5 Geo. II. c. 30, s. 28. *Sampson v. Burton*, 2 Brod. and Bing. 89.

NEW TRIAL.

See *Practice*, 4.

1. Where a bankrupt sued for the benefit of his assignees, the court refused to grant a new trial, unless his assignees would abide by the verdict, and become responsible for the costs. *Noble v. Adams*, 7 Taunt. 59.

NEWS VENDER.

See *Act of Bankruptcy*, 9.

NONSUIT.

See *Pleading*, 6.

NOTICE.

See *Gazette*, 1.

Bills of Exchange, 18, 19.
Commission, 7, 8.
Partners, 18.

ORDERS.

1. Leaving the order at the place where the witness resided when served with the summons, ordered to be good service. Ex parte *Bowler* re *Wetherelt*, 1 Buck C. B. 258.

ORDERS GENERAL.

General Order June 11, 1817.
Petitions struck out of the Vice Chancellor's paper on account of non attendance, not to

ORDER AND DISPOSITION.

be restored, except by order made upon petition. 1 Buck C. B. 107.

General Order July 25, 1817.

Solicitors applying for commissions are to certify that none of the persons, to whom the commission is requested to be directed, are creditors of the bankrupt. 1 Buck C. B. 108.

General Order Aug. 21, 1818.

No commission to be superseded on the ground of the consent of all the creditors, who shall have proved their debts, having been given, until after the second meeting. The commissioners being satisfied at the second meeting that a petition will be presented for superseding the commission, with the consent of all the creditors who shall have proved debts, shall adjourn the choice of assignees to some future day. 1 Buck C. B. 281.

ORDER AND DISPOSITION.

See *Dormant Partner*, 1.

Gazette, 1.

Bills of Exchange, 12.

Ship Registry Acts, 3, 4.

Stoppage in Transitu, 4.

1. Utensils of trade, being the property of one partner, and insured in his name, are left in the ordering and disposition of the partners. A fire happens, by which they are consumed. After the fire, a joint commission issues against the partners. The insurance money is paid to the joint assignees. Held, that the insurance money does not pass by the assignment under the joint

ORDER AND DISPOSITION.

commission. Ex parte *Smith re Bakewell*, 1 Buck C. B. 149.

2. Bond debt assigned by the obligee, and the bond delivered to the assignee; but notice of the assignment not given to the obligor previous to the bankruptcy of the obligee. Held, that the debt remained in the ordering and disposition of the bankrupt within the statute 21 Jac. I. c. 19. Ex parte *Monro re Frazer*, 1 Buck C. B. 300.

3. A trustee for the sale of a brewhouse and plant (the *cestuique* trusts being infants) contracts to sell them, and lets the purchaser into possession. Held, that the purchaser was in possession within the statute of 21 Jac. I. c. 19, and therefore the plant, upon his becoming bankrupt, passed to his assignees without being subject to the lien for the purchase money. Ex parte *Dale re Barker*, 1 Buck C. B. 365.

4. Stock standing in the Accountant General's name is mortgaged to secure a debt: the Accountant General transfers the stock to the mortgagor without the privity of the mortgagee. The mortgagor then becomes bankrupt. Held, that the stock could not be claimed by the assignees, under the 21 Jac. I. c. 19, s. 10, 11. Ex parte *Richardson re Cheshire*, 1 Buck C. B. 480.

5. A transfer of a ship and cargo at sea, conveyed by M to S as a security for money borrowed, by executing and delivering to S a bill of sale of the ship, a policy upon ship and cargo, and indorsing the bills of lading, was held

not to pass the property to S, where S neglected upon the ship's return and notice thereof to take possession, or to do any act to notify the transfer of the property to him; but that the property passed to the assignees of M, who became bankrupt, as being in the possession, order, and disposition of M at the time when he became bankrupt within the statute 21 Jac. I. c. 19. Also that an agreement between M and the captain, that the captain should have one fifth share of the profit or loss of the voyage, on ship and cargo, did not prevent S from taking possession. *Mair v. Glennie* and others, assignees of *J. Mair v. Glennie* and others, assignees of *Sharpe and Co.* 4 Maul. and Sel. 240.

6. A levies an execution on the goods of B, a trader. He directs the sheriff's officer not to sell, but to leave a man in possession with the warrant. B carries on his trade as usual, and five months afterwards becomes a bankrupt. Held, that notwithstanding the execution and possession of the officer, the goods seized passed to the assignees by virtue of the statute 21 Jac. I. c. 19, s. 11. *Toussaint v. Hartop*, 1 Holt N. P. Rep. 335.

7. In an action, by the assignees of a bankrupt, claiming property which the bankrupt is alleged to have had in his possession, order, and disposition, as the reputed owner at the time of his bankruptcy, it is competent for the defendant, who has paid a valid consideration for the property, to give evidence of a contrary reputation, and to resist the

ORDER AND DISPOSITION.

claim of the plaintiff under the statute 21 *Jac. I. cap. 19, s. 11*, upon those grounds. *Gurr v. Rutton*, 1 *Holt N. P. Rep.* 327.

8. Goods sent to a trader upon sale and return, in the common acceptance of that mode of dealing, will pass to his assignees under the statute of James I. *Gibson v. Bray*, 1 *Holt* 556.

9. A being indebted to B, assigns a ship to C as a trustee for B, by way of mortgage. The ship is registered *de novo* in the name of C, and a certificate of registry is put on board; but she is left under the controul of A, who becomes a bankrupt. *Quære*—If she passes to his assignees under the statute of 21 *Jac. I. c. 19. Hay v. Monkhouse*, 1 *Holt* 603.

10. Goods were sent from London to Sunderland, upon sale or return, and a letter enclosing an invoice requested the buyer to return such of them as were not approved by him, in as short a time as possible. The goods arrived at the shop of the buyer on the evening of the 13th November, and on the following day he committed an act of bankruptcy. In an action of trover, brought by the seller against the assignees to recover these goods:—Held, that they did not pass to such assignees under the statute 21 *Jac. I. cap. 19. s. 11*, as the bankrupt should have been allowed a reasonable time to have selected such goods as he was disposed to retain. *Gibson v. Bray*, 1 *Moore* 519.

11. Where the question was, whether a bankrupt had posses-

sion of a stack of bark as reputed owner:—Held, that evidence of his being reputed the owner of it was properly admitted, facts having been proved which amounted to a disposition of the property by him as owner. *Oliver v. Bartlett*, 1 *Brod. and Bing.* 269.

12. Where a person entitled to take out letters of administration neglected to do so, but remained in possession of the goods of the intestate; and being so in possession, became a bankrupt; and a creditor of the intestate afterwards took out letters of administration, and claimed the goods from the assignees:—Held, that these goods were within 21 *Jac. I. c. 19*, being property in the possession, order, and disposition of the bankrupt, with the consent of the true owner; and that the assignees were therefore entitled to them. *Fox against Fisher*, 3 *Barn. and Ald.* 135.

13. A trader assigned a ship to A in trust, to pay a debt due from the trader to A and his partners, but with their permission retained the possession and disposition of the ship at the time of his bankruptcy. Held, that the ship passed to the assignees under the commission of bankruptcy, by virtue of the 21 *Jac. I. c. 19, s. 11*, although before the act of bankruptcy the register was indorsed to A; and shortly afterwards (three months before the issuing of the commission) the ship was newly registered in his name, and continued so registered at the time the commission was issued. *Monkhouse v. Hay*, 2 *Brod. and Bing.* 114.

PARTNERS.

14. The 21 *Jac. I. c. 19, s. 11*, is not repealed as to shipping by the ship register acts. *Monkhouse v. Hay*, 2 *Brod. and Bing.* 114.

15. Goods are delivered to a bailee on a contract of sale and return, the bailee has no authority to pledge the goods. Application of the statute 21 *Jac. I. c. 19, s. 10*, to such a case. *De-launey v. Barker*, 2 *Starkie* 539.

OUTLAWRY.

1. Judgment of outlawry against two of three joint debtors does not make the debt a separate one, as against the third debtor; and it cannot be proved under his separate commission. Ex parte *Dunlop re Beasley*, 1 *Buck C. B.* 253.

PARISH OFFICERS.

See *Certificate*, 17.

PARTNERS.

See *Supersedeas*, 3.

Petition, 5.

Docket, 2, 3.

Dormant Partner, 1.

Bills of Exchange, 1, 2, 4.

Joint Creditors, 1, 2.

Order and Disposition, 1.

Appropriation, 1.

Agreement, 1, 2.

Certificate, 14.

Dissolution of Partnership, 1.

Evidence, 17.

Fraudulent Commission, 1.

Ship Registry Acts, 1.

Trading, 4, 5, 11.

VOL. I.

Y Y

1. A creditor, who sues out a commission of bankrupt against one of two partners, upon a joint debt, and receives a dividend, may bring an action against the other partner for the residue.— Ex parte *Bolton re Muckenzie*, 1 *Buck C. B.* 12.

2. A, a trader, being indebted to several persons, enters into partnership with B, and brings his stock in trade into the partnership. By the partnership articles it was agreed, that the joint trade should pay the creditors of A named in the schedule. Held, that a separate creditor of A named in the schedule did not, by the articles, become a joint creditor of A and B. Ex parte *Williams re Joseph*, 1 *Buck C. B.* 13.

3. A retiring partner, by an agreement in writing, assigns and sells all the stock, debts, &c. to the continuing partner, who agrees to pay a debt owing by the retiring partner, and also to pay him an annuity of £100 *per annum*; for the due payment of which the agreement recited, that the father of the continuing partner, who was not a party thereto, would be security. Held to be an executory agreement; and the father refusing to become security, the partnership stock, &c. was not thereby transferred to the continuing partner. Ex parte *Wheeler re Mallam*, 1 *Buck C. B.* 25.

4. A retiring partner assigns all his share in the concern to two of the continuing partners, upon trust for his infant children, in such shares as he should ap-

PARTNERS.

point; and in default of appointment, upon trust for the children, to be divided amongst them when the youngest shall attain to twenty-one. Held, that the contingent interest the father had in the share so assigned, depending upon the death of any of the children under twenty-one, was such an interest reserved by him in the concern, as, with reference to creditors, prevented the determination of the partnership. *Ex parte Wilson re Colbeck*, 1 *Buck C. B.* 48.

5. If a retiring partner assign all his share in the concern to two of the continuing partners, upon trust to pay him an annuity for his life, subject to abatement or enlargement with the fluctuation of the profits of the trade, that will not, with reference to creditors, determine the partnership. *Ex parte Wilson re Colbeck*, 1 *Buck C. B.* 48.

6. If a solvent partner pay all the joint debts, his proof against the separate estates of his partners, will be limited to the amount of their respective shares of the joint debts so paid; and if their estates are insufficient to pay twenty shillings in the pound, the solvent partner will not be allowed to prove the deficiency of each estate against the estate of the other. *Ex parte Watson re Sheath*, 1 *Buck C. B.* 449.

7. A partner who, after getting his certificate, had taken up the notes of the firm, permitted to prove against the joint estate. *Ex parte Atkins re Atkins*, 1 *Buck C. B.* 479.

8. On the death of a partner in a banking house, the surviving partners carry on the business without changing the firm, and afterwards become bankrupt. The equities of the several classes of creditors of the partnership against the estate of the deceased partner, with reference to the alleged solvency of the house at his death, to the effect of subsequent dealings and transactions with the survivors, and of notice expressed or implied, and to the custom of bankers, declared, upon exceptions to the report of the master, distinguishing the classes of creditors according to the different nature of the circumstances. *Devaynes v. Noble*, 1 *Meri.* 530.

9. Creditors at the death of D, who continued to deal with the surviving partners, and were paid by them in part, (including also, creditors whose debts remained unaltered, either by receipt or payment, and those whose debts had been subsequently increased by payments to the surviving partners). Held, no discharge of the deceased partner's estate. *Devaynes v. Noble*, *Sleech's case*. 1 *Merivale* 539.

10. The common law only partially adopts the *lex mercatoria* in respect of partnerships in trade, holding that there is no survivorship, in respect of interest, in such partnership; but that in respect of partnership contracts, the obligation is joint, and attaches exclusively on the survivors. Relief in equity upon joint bonds given on the ground

PARTNERS.

of mistake. *Devaynes v. Noble. Sleech's case.* 1 *Merivale* 563.

11. Equity of a creditor against the estate of a deceased partner not barred by eight months' non-claim, and payment in part by the surviving partner. *Devaynes v. Noble. Sleech's case.* 1 *Merivale* 566.

12. No difference in principle, between the case of a banking house and any other partnership, as to the equity of the creditor against the deceased partner's estate. Money paid into a banker's constitutes a debt, not a deposit. A creditor's leaving money in the hands of the surviving partners in a bank, does not constitute a new contract, nor operate as a relinquishment of the old security. *Devaynes v. Noble. Sleech's case.* 1 *Merivale* 568.

13. No rule of convenience, fixing any period within which a creditor of a banking house, not making his demand on the surviving partners, is held to have waived his equity against the estate of the deceased partner. *Devaynes v. Noble. Sleech's case.* 1 *Merivale* 569.

14. Notice of the death of the deceased partner, whether before or after the creditor has received payment in part from the surviving partners, not material. *Devaynes v. Noble. Sleech's case.* 1 *Merivale* 570.

15. Creditor, by drawing on the surviving partners, recognises them as his debtors, but not exclusively. *Devaynes v. Noble. Sleech's case.* 1 *Merivale* 570.

16. Deposit with the partnership of exchequer bills, which were sold in D's lifetime, and the produce applied to the use of the house. D's estate is responsible in respect of the breach of trust; and not discharged by subsequent acts, from which an inference might be drawn of the creditor's adopting the surviving partners as his debtors. *Devaynes v. Noble. Cluyton's case.* 1 *Merivale* 575.

17. The amount of money received by the sale of the exchequer bills, becomes a partnership debt, which accrued from the moment when they were sold without the consent of the creditor; and this whether the individual partners were or were not privy to the sale. The sale of the exchequer bills amounts only to a breach of trust. *Devaynes v. Noble. Clayton's case.* 1 *Merivale* 579.

18. Notice to the surviving partners given by a creditor of the partnership, as solicitor for the representatives of the deceased partner, that the estate of the deceased will not be liable for their future dealings, does not operate as discharging the estate from a debt previously incurred to that creditor, of which he was at the time ignorant. Payments subsequently made in respect of cash balances, not to be taken as operating in extinction of such a debt. *Devaynes v. Noble. Clayton's case.* 1 *Merivale* 580.

19. Interest upon the exchequer bills allowed at £5. per cent. from the time of the sale, upon the ground that the claim-

PARTNERS.

ant had a right to consider it as a debt from that time, and had elected so to consider it. *Devaynes v. Noble. Clayton's case.* 1 *Merivale* 580.

20. Creditors who, after D's death, continued to deal with the surviving partners, by drawing out and paying in; but having drawn sums out before they paid any in, the balance varying from time to time, but being upon the whole increased by such subsequent dealings, the subsequent payments by the surviving partners must be taken in reduction of the balance due at D's death; and his estate held discharged, *pro tanto.* *Devaynes v. Noble. Clayton's case.* 1 *Merivale* 585.

21. Creditors, in respect of stock standing in the names of the partners, which was sold in breach of trust, and the proceeds applied to the use of the partnership, entitled as against the estate of the deceased partner, either to consider it as a debt, or to have the stock specifically replaced, at their option. It makes no difference, that the stock stood in the name of, and was sold by one of the partners only, the proceeds having been applied to the partnership use. *Devaynes v. Noble. Baring's case.* 1 *Merivale* 611.

22. Deposit of bills with the house in D's lifetime, which were sold by the house, part in his lifetime, and part after his death. The estate of D is not answerable in respect of the latter, though in this particular case it appeared that the party who deposited

them had no notice of the death of D. *Devaynes v. Noble. Houlton's case,* 1 *Merivale* 616.

23. Creditors at the death of D, who continued to deal with the surviving partners, both by drawing out and paying in money, whereby their debts were increased, but never at any time reduced. Held, no discharge of the deceased partner's estate. *Devaynes v. Noble. Palmer's case,* 1 *Merivale* 623.

24. Transfer of stock to the partnership, as a security for advances, under an agreement not to sell without notice. D's estate liable to the full extent of stock sold contrary to such agreement, and not only to the extent of the stock sold beyond the amount of the debt due to the partnership, in respect of advances made by them. *Devaynes v. Noble. Warde's case,* 1 *Merivale* 624.

25. Order for goods by two partners; afterwards partnership dissolved; a bill drawn on the two partners, but accepted only by one, who carried on a separate trade, and the goods delivered to him, no claim can be made on the other partner. *Ex parte Harris,* 1 *Mad.* 583.

26. On a dissolution of partnership, the retiring partner sells the concern with the partnership property to the other; but some of the partnership property remains in the partnership names, and in the order and disposition of both. They afterwards become bankrupts, and separate commissions issue against them. There being property outstanding in the partnership names, the

PARTNERS.

joint creditors cannot prove under the separate commission against the retiring partner. Ex parte *Harris*, 1 *Mad.* 583.

27. One partner acts for all, almost universally in bankruptcy; proving debts, voting for assignees, and signing certificates. Ex parte *Hodgkinson*, 19 *Ves.* 293.

28. By deed of partnership between A, B, and C, it was provided, that in case of a dissolution of the partnership, by the death or certain acts of misconduct of any partner, or by notice, the other partner should have the option of taking his share at a valuation, to be paid by yearly instalments, the last of which was not to be payable till seven years after the dissolution; and that in case of the bankruptcy or insolvency of a partner, the partnership should be dissolved, the property sold, and the produce divided among the partners, according to their proportions. The partners four years afterwards, by another deed, recited and declared it to have been their intention in the former deed, that the same mode of arranging the partnership concerns should take place in case of the bankruptcy or insolvency of a partner, as in the cases of the dissolution by death, notice, or misconduct. B became bankrupt four months after the last deed was executed. Held, that, on B's bankruptcy, the partnership effects were to be disposed of in the same manner as if the second deed had not been made. Semble, such a provision, even if it had been in the

first deed, would have been void, as against the policy of the bankrupt laws. *Wilson v. Greenwood*, 1 *Wils. Rep.* 223.

29. Articles of partnership having provided that, on dissolution by death, notice, or misconduct of a partner, the remaining partners should have the option of taking his share at a valuation payable by yearly instalments in the course of seven years, and that on the bankruptcy or insolvency of a partner, the partnership should be immediately void as to him; by a deed four years subsequent, the partners declared, (after a recital that such was their intention in the articles), that, in the event of bankruptcy or insolvency, the same arrangement should be practised as on dissolution by death, notice, or misconduct. One of the partners having become bankrupt within a few months after the execution of the latter deed, his assignees are not bound by it. Whether a provision in articles of partnership, that on the bankruptcy of a partner his share shall be taken by the solvent partners, at a sum to be fixed by valuation, and payable by instalments in a course of years, is not void by the statutes concerning bankrupts. *Quære. Wilson v. Greenwood*, 1 *Scan.* 471.

30. R. C being in possession of mines and iron works, held under leases of unequal duration, by his will bequeathed £25,000 to B, "as a capital for him to become a partner with my executors of one fourth share in the trade of all those works, so long

PARTNERS.

as the lease endures," with a devise to H and his wife of the residue of his estates, real and personal: by a codicil the testator gave to W. C three-eighths of the concern at the iron works: "so the partnership will stand at my decease, W. C three-eighths, H three-eighths, B two-eighths." After the testator's death, W. C, H, and B carried on the works for two years, selling iron, manufactured not only from the produce of their mines, but from ore and old iron purchased for the purpose of manufacture and resale. B, having then assigned his share to C, the business was carried on in like manner by C and H, till the death of the latter: no agreement having ever been entered into for the duration of the partnership. 1. The codicil withdraws the trade from the operation of the residuary clause in the will, and vests three-eighths in H, to the exclusion of his wife. 2. The concern is not a mere joint interest in land, but a partnership in trade. 3. The purchase of a leasehold interest, as part of a stock in trade, is not evidence of an agreement to contract a partnership commensurate with the duration of the lease. 4. The partnership is dissolved by the death of H. 5. In a suit instituted by W. C, praying a sale of the partnership property, the court, on motion, directed an inquiry whether it would be for the benefit of all parties interested, that the works should be sold, or carried on for the purpose of winding up

the concern. *Crawshay v. Maule*, 1 Swan. 495.

31. Dormant partner. Ex parte *Norfolk*, 19 Ves. 455.

32. Partner by a share in the profits, without interest in the capital. Ex parte *Norfolk*, 19 Ves. 457.

33. Election of a creditor to resort to a dormant partner as a joint creditor or not. Ex parte *Norfolk*, 19 Ves. 458.

34. As to late decisions at law in favor of a plea of dormant partner. Quære. Ex parte *Norfolk*, 19 Ves. 458.

35. Partner by the use of his name without interest in the profits. Ex parte *Watson*, 19 Ves. 459.

36. Distinction between a dormant and nominal partner. The former liable in respect of profits, but one receiving a salary not charged on profits is not by that a partner. Ex parte *Watson*, 19 Ves. 461.

37. As to an action by one for a debt contracted with him and another, permitted to prove that he was not a partner, and the plea of dormant partner, where not to the plaintiff's injury.—Quære. Difficulty upon that with reference to the case of principal and surety. Ex parte *Watson*, 19 Ves. 461.

38. Mortgage to partners, their heirs, and assigns, to secure debts, due or to become due to them or the survivor, whether available to a new partnership formed by the addition of another in whose time the debt accrued. Quære. Ex parte *Watson*, 19 Ves. 459.

PETITIONS.

PAYMENT AFTER AN ACT OF BANKRUPTCY.

1. Act of bankruptcy by lying two months in prison. During the imprisonment, A advanced to the bankrupt money for the purpose of settling with his creditors. The purpose failing, a part of the money was repaid to A by the bankrupt. Held, that this repayment was protected, and that the assignees could not recover the money so repaid. *Toovey v. Milne*, 2 *Barn. and Ald.* 683.

2. A creditor, to whom a trader had long promised payment by bills on debtors to himself, did, under a threat of arrest, after an act of bankruptcy unknown to the creditor, but with the creditor's knowledge that the trader must stop payment, sign bills on his debtors in favor of the creditor, on stamped paper produced by the creditor. Held, that the assignees of the creditor could not bring trover for these bills. *Walker v. Laing*, 7 *Taunt.* 568.

PETITIONS.

See *Practice*, 1, 3, 12.
Dividend, 1, 2.
General Orders, 1.
Supersedeas, 17, 18.
Stamps, 1.
Solicitor, 9.

1. A petition to enforce a claim ought to state the grounds of rejection by the commissioners. *Ex parte Schmaling re Aldebert*, 1 *Buck C. B.* 93.

2. If a person presenting a pe-

tition to supersede a commission himself becomes a bankrupt before the petition is heard, his assignees must present a supplemental petition to have the benefit of that already presented, or it will be dismissed. *Ex parte Birdwood re Symmons*, 1 *Buck C. B.* 99.

3. A petition presented by assignees must, under the general order, 12th August, 1809, be signed by all who present it, and not by one only, as in the case of partners. *Ex parte Morgan re Higgins*, 1 *Buck C. B.* 109.

4. Petition to expunge a charge of collusion made in another petition, and to be heard before that petition, dismissed with costs. That other petition coming on to be heard, and the charge of collusion being unfounded, it was dismissed with costs as against the party so charged. *Ex parte Leigh re Biston*, 1 *Buck C. B.* 132.

5. One of two partners, the other being abroad, proves a debt, and dies. Service of the petition, to expunge the debt, upon the attorney appointed to receive the dividends, ordered to be good service upon motion. *Ex parte Peyton re ———*, 1 *Buck C. B.* 200.

6. The general rule in bankruptcy is, that if the petitioner do not pray his costs, he cannot have them. *Ex parte Atkinson re Goodchild*, 1 *Buck C. B.* 215.

7. Petition allowed to stand over to amend the title. *Ex parte Mills re Coles*, 1 *Buck C. B.* 230.

8. Application to permit a pe-

PETITIONS.

tion to be signed by the petitioner's agent in London, granted, it being near the end of the sittings after Trinity term. *Ex parte Stone re Bruin*, 1 *Buck C. B.* 255.

9. Petition by the bankrupt, to expunge the proofs of various creditors, dismissed as being multifarious. Costs not given out of the estate, on the ground that it would be hard upon the other creditors, whose debts were indisputable. *Ex parte Coles re Coles*, 1 *Buck C. B.* 256.

10. The general order of the 12th of August, 1809, held not to be complied with by the solicitor authenticating the signature of the petitioner without attesting it. *Ex parte Bury re Mather*, 1 *Buck C. B.* 393.

11. When a petition of rehearing is presented, an order to have the original petition reheard may be had upon an *ex parte* application. *Ex parte Hensor re Boss*, 1 *Buck C. B.* 427.

12. Petition by the bankrupt to supersede the commission dismissed without a counter petition, the commission having been established by an action at law, and the bankrupt not appearing. *Ex parte Caponhurst re Caponhurst*, 1 *Buck C. B.* 476.

13. A petition may be framed in the alternative, and the respondent cannot call upon the petitioner to elect to proceed for only one of the objects of the petition, unless under special circumstances. *Ex parte Scholey re Greenway*, 1 *Buck C. B.* 476.

14. Petitions to supersede commissions must be served on the

bankrupt. *Ex parte Barber re Shaw*, 1 *Buck C. B.* 493.

15. It is the practice of the court to take the assistance of a jury when there is so much of doubt, that such assistance is felt to be necessary to the right determination of the case. But it is not the practice of the court to put the parties to the expense of trial by jury, without first hearing all the evidence read, and the case fully argued, unless the counsel on both sides agree in stating that such must necessarily be the result if the matter were gone into. Upon this principle the Lord Chancellor heard a petition upon an appeal from the Vice Chancellor's order directing an action to be brought. *Ex parte Heygate re Humble*, 1 *Buck C. B.* 442.

16. In strict practice, the application to postpone the hearing of a petition cannot be by motion; but if the opposite party do not object to the application by motion, affidavits filed after the petition day may be read in support of it. *Ex parte Gitton re Gitton*, 1 *Buck C. B.* 549.

17. Although the affidavits in support of a petition, and those in opposition to it are conflicting, yet the court ought to hear them read, and the arguments of counsel before it sends the parties to try the question at law. Where the trading upon the proceedings was only proved by a single witness, who, in an affidavit filed upon a petition to supersede the commission, contradicted that which he had formerly deposed to before the commissioners,

PETITIONING CREDITOR.

the court superseded the commission. Ex parte *Trustum* re *Trustum*, 1 *Buck* C. B. 550.

PETITION TO STAY CERTIFICATE.

See *Certificate*, 2, 3, 4, 5, 8.

PETITIONING CREDITOR.

See *Costs*, 2.

Supersedeas, 2.

Proof, 1.

Docket, 2, 3.

Jurisdiction, 5.

Baron & Feme, 1.

Estoppel, 1.

Solicitor, 8.

1. A joint creditor sues out two separate commissions. Under one he proves against the joint estate, and receives a dividend, at which time he was ignorant of his right to prove against the separate estate of the other. Held, that he had not conclusively elected to prove as a joint creditor; but that, refunding the dividend, with interest, he might prove as a separate creditor. Ex parte *Bolton* re *Mackenzie*, 1 *Buck* C. B. 7.

2. A petitioning creditor who, with the knowledge of two or three of the creditors, received his debt from the bankrupt.—Held to have forfeited it, under the 5 *Geo. II. c. 30, s. 24*. Ex parte *Brine* re *Budgett*, 1 *Buck* C. B. 108.

3. An executor, who sues out a commission, and afterwards, but before the adjudication of the commissioners, obtains probate of the will, is a good petitioning creditor. Ex parte

Paddy re *Drakeley*, 1 *Buck* C. B. 235.

4. It is a contempt of the great seal for a petitioning creditor to strike a docket at the instance of a solicitor, who undertakes to prove the act of bankruptcy, and to guarantee him against any expenses he may be put to by issuing the commission: and the court, therefore, will not, upon the petition of such a creditor, tax the solicitor's bill of costs. Ex parte *Wilson* re *Nicholson*, 1 *Buck* C. B. 306.

5. A sues out a commission of bankrupt against B upon a debt due to him as executor, but the probate of the will has an insufficient stamp. Afterwards however a sufficient stamp being affixed—Held, that it was sufficient to support the petitioning creditor's debt in an action by the assignees. *Robert Rogers* and another, assignees of *Thomas Rogers*, a bankrupt, v. *James*, 2 *Marshall* 425.

6. Residence of a British subject in an enemy's country for the purpose of a trade licensed by the government of this country, not a disability to sue or take out a commission of bankruptcy. Ex parte *Baglehole*, 18 *Ves.* 525.

7. A creditor who assents to and acts under an absolute bill of sale for the benefit of creditors, but does not sign the deed, cannot afterwards sue out a commission against the debtor, on the ground, that the absolute bill of sale was an act of bankruptcy. Ex parte *Shaw*, 1 *Madd.* 598.

PETITIONING CREDITOR'S DEBT.

8. A petitioning creditor cannot dispute the validity of a commission of bankrupt sued out by himself, although, in an action brought against him by the assignees, it appears that, on the balance of accounts, the bankrupt was indebted to such petitioning creditor in a less sum than £100. *Harmer v. Davis*, 1 *Moore* 300.

9. A commission of bankrupt may be supported on a debt due to the petitioning creditor in the character of executor, although he have not obtained a probate on a sufficient stamp at the time when the commission issued, if he afterwards obtains a valid probate, for that has relation back to the testator's death. *Rogers v. James*, 7 *Taunt.* 147.

10. A commission may be taken out by an executor before he has obtained probate. Ex parte *Paddy* re *Drakeley*, 3 *Madd.* 241.

PETITIONING CREDITOR'S DEBT.

See *Petitioning Creditor*, 5, 9, 10. *Evidence*, 21.

1. A purchases coals of B, and agrees to give him a bill of exchange for part of the purchase money, payable at two months. Afterwards A sends to B a paper purporting to be a bill accepted by him, with a blank left for the name of B, as the drawer; B keeps the paper, but does not fill up the blank till after he had sued out a commission against A. Held, that the bill did not constitute a valid petitioning cre-

ditor's debt, and that B, having elected to keep the bill, could not prove his debt as petitioning creditor for goods sold and delivered. Ex parte *Farenden* re *Farenden*, 1 *Buck C. B.* 34.

2. A commission cannot be supported upon a petitioning creditor's debt made up of debts due to several persons, if one of them is an infant, and a separate creditor of the trader. Ex parte *Morton* re *Morton*, 1 *Buck C. B.* 42.

3. If a bill of exchange do not carry interest upon the face of it, a debt made up of the principal sum secured by the bill, and the interest up to the act of bankruptcy, though the bill be noted and protested, according to the 9th and 10th of *William III.* c. 17, is not a good petitioning creditor's debt. Ex parte *Greenway* re *Burgess*, 1 *Buck C. B.* 412.

4. Interest accruing before the act of bankruptcy cannot be added to the principal sum due on a bill of exchange, so as to constitute a good petitioning creditor's debt, unless interest be specially made payable on the face of the bill. *Cameron and others v. Smith and others*, 2 *Barn. and Ald.* 305.

5. Where A deposits with B goods to be sold, and on a sale being effected, the profits, after deducting the cost price, &c. are to be equally divided between them, but the loss, if any, is to be borne exclusively by A; if B effect a sale, and receive the money, the debt due from him to A is sufficient to support a com-

PLEADING.

mission of bankruptcy against B.
Marston v. Barber, 1 *Gow*. 17.

PLEA.

See *Certificate*, 6, 24.

Foreign Courts, 1.

Pleading, 1, 5, 8, 9, 11, 12.

PLEADING.

See *Suit in Equity*, 1.

Foreclosure, 1.

Action, 5, 6.

Abatement, 1.

Demurrer, 1.

Extent, 2.

Gaming, 2.

Indictment, 1.

1. Plea of bankruptcy, to a bill by bankrupts, seeking a discovery in aid of their defence to an action, and payment of the balance found due to them on the taking of the accounts, and an injunction in the mean time, overruled. *Lowndes v. Taylor*, 1 *Madd*. 423. 2 *Rose C. B.* 365. *S. C.* affirmed upon the appeal, 2 *Rose C. B.* 432.

2. The assignees under a joint commission against A and B may, in an action to recover a debt due to A alone, describe themselves in the declaration as the assignees of A alone. *Harvey v. Morgan*, 2 *Starkie* 17.

3. A commission of bankruptcy recited that A. B became bankrupt with intent to defraud C and D, surviving partners of *Edmond Darby*, but the writ of supersedeas stated them to be surviving partners of *Edward Darby*. Held, in an action for maliciously suing out the commission, that the variance was fatal.

Matthews v. Dickinson, 1 *Moore* 104.

4. No action at law will lie against trustees, either by their *cestui que trust*, or in case of his bankruptcy by the assignees of such *cestui que trust*. *Allen v. Imlett*, 1 *Holt*. 641.

5. Plea of certificate allowed, where the plaintiff, before the bankruptcy, had a remedy by assumpsit, and for a tort; the bill being considered as brought in lieu of the remedy by assumpsit, no bill founded on a tort being sustainable. *De Tastet v. Sharp*, 3 *Mad*. 51.

6. The non-joinder of a joint assignee of a bankrupt, in an action of assumpsit brought by the assignees, is a ground of nonsuit upon the trial, under a plea of the general issue. *Snelgrove v. Hunt*, 2 *Starkie* 424.

7. A, B, and C, having been appointed assignees under three separate commissions of bankrupt, cannot sue as joint assignees, but must state their several and respective interests in the declaration. *Ray v. Davies*, 2 *Moore* 3.

8. A general plea of bankruptcy must be delivered, and not filed. *Henderson v. Sanson*, 2 *Barn. and Ald*. 392.

9. Counts upon a promise by the defendant and another, since become a bankrupt and certificated, may be joined in an action against the solvent partner alone, with counts on promises by the defendant solely since the other became a bankrupt. But the defendant might plead the joint contract in abatement. *Haw-*

PLEADING.

kins v. Ramsbottom, 6 Taunt. 179.

10. In an action against a member of parliament, two persons became sureties in a bond, conditioned for the payment of such sum as should be recovered with costs. The cause proceeded, and notice of trial being given, the defendant filed a bill in equity, and obtained an injunction, pending which he became bankrupt. Having suffered a term to elapse after obtaining his certificate without pleading it, the court refused to let him plead it as of the former term, except on condition of dismissing his bill in equity, and paying all costs at law and in equity, as between attorney and client. *Duff v. Campbell*, 3 Burn and Ald. 577.

11. Plaintiff having become bankrupt before plea pleaded, defendant obtained an order for giving security for costs, and afterwards pleaded bankruptcy. Held, that the plea could not be set aside, but that the order for giving security for costs should be rescinded, the plaintiff to pay the costs of that application, and the defendant's rule discharged. *Minchin v. Hart*, 1 Chitty 215.

12. A general plea of bankruptcy must be delivered and not filed, but on an affidavit of merits the court set aside the judgment signed for want of a plea on terms. *Henderson v. Sansum*, 1 Chitty 225.

13. Goods in the possession of a bankrupt, and but for the bankruptcy his property being taken in execution after the act

POWER.

of bankruptcy, but two months before the issuing of a commission against the bankrupt were (in assumpsit by the assignees of a bankrupt on a guarantee given to the bankrupt) described in the declaration as the goods of the bankrupt. Held, that such description was proper. *Sampson v. Burton*, 2 Brod. and Bing. 89.

PLEDGES.

See *Mutual Debts and Credits*, 3.

1. Bankrupt's property pledged must be sold, and the excess proved as a debt. Ex parte *Two-good*, 19 Ves. 231.

POLICY OF INSURANCE.

See *Insurance and Insurance Broker*.

POSSESSION.

See *Transfer of Possession*, 1, 3.

1. Ejectment against the assignees of a bankrupt proof; that upon being required to give up possession of the premises, they answered, that it was not consistent with their duty so to do, is sufficient proof of possession. *Doe. dem. Radnor v. Taylor and others*, 2 Starkie 535.

POWER.

See *Deed of Separation*, 1.

1. A trader being seized of an estate for life, with the general power of appointment, with remainder, in default of appointment, to himself in fee; after having committed an act of bank-

PRACTICE.

ruptcy, upon which he was declared a bankrupt, executes his appointment in favor of an appointee. Held, that all his interest having passed to the assignees by the assignment, that such appointment was void, and therefore, that his assignee under the commission had a sufficient legal estate to maintain an ejectment. *Doe. d. Coleman v. Britain*, 2 Barn. and Ald. 93.

POWER OF ATTORNEY.

See *Ship Registry Acts*, 2.

1. A power of attorney to execute the indorsement of sale upon the register of a ship when she returns home, is not revoked by the bankruptcy of the party giving the power. *Dixon v. Ewart*, 1 Buck C. B. 94.

2. Power of attorney sent out to India, acts done there by the attorney after the death of the principal without notice of his death supported. 1 Buck C. B. 405.

PRACTICE.

See *Commission*, 2.

Certificate, 1.

Conspiracy, 1.

Supersedeas, 1, 8, 10, 11.

Proof, 1, 6, 10, 31, 34.

Petition, 8, 10, 11, 12, 14, 15, 16.

Docket, 1, 2, 3.

Issue, 1, 2, 3.

Order, 1.

Witness, 1, 2, 3.

Bail, 1, 2, 3, 4, 5, 6.

New Trial, 1.

Trust Deed, 1.

Action, 15.

Pleading, 12.

1. Petition not to stand over for the purpose of replying to affidavits, unless the application be made at least two days before the petition appears in the paper. Ex parte *Wiltshire re Turnbull*, 1 Buck C. B. 232.

2. Where it is merely a question of convenience, it will be left to the assignee to chuse whether mortgage accounts shall be taken before the commissioners or a master. Ex parte *Ansley re Tickell*, 1 Buck C. B. 292.

3. If, when a petition is called, the petitioner do not appear, the respondent must produce an office copy of the affidavit of service, before the rising of the court, to entitle him to his costs. Ex parte *Astell re Still*, 1 Buck C. B. 396.

4. In an action brought under the Chancellor's order, a new trial may be moved for in the court where the action is depending, though the action could not be sustained without the aid of the Chancellor's order. *Carstairs and others*, assignees of *Kensington and others*, v. *Stein and others*, 4 Maule and Sel. 192.

5. Order for payment out of a bankrupt's estate, with interest to the time of payment, in preference to all other creditors, with costs under stat. 51 Geo. III. c. 15. s. 48. for an issue of exchequer bills to relieve commercial credit. Ex parte *Holden*, 18 Ves. 436.

6. The court will not on motion exonerate bail, upon the ground that the cause of action for which they are bail, is money paid for their principal, who is a

PRACTICE.

bankrupt, by his sureties, who therefore might have proved under the commission by 49 *Geo. III. c. 121, s. 8. Hewes v. Mott, 6 Taunt. 329.*

7. Upon a *subpœna duces tecum* a witness is bound to produce a paper which he has in his actual custody, though the legal right and property in such paper belong to another. The court however in all such cases will exercise their discretion in deciding what papers shall be produced, and under what qualifications as respects the interest of the witness. *Corsen v. Dubois, 1 Holt N. P. Rep. 239.*

8. Such witness is bound to produce them, though there be a regular way prescribed by law for obtaining such document. *S. C.*

9. The court refused to allow plaintiff to amend a *fi. facias* where the defendant had become bankrupt before sale of the goods taken under it. *Hunt v. Pashman, 4 Maul. and Sel. 329.*

10. Petition to have a commission of bankruptcy, of a date previous to the act of bankruptcy, resealed, refused, *Ex parte Choesewright, 18 Ves. 480.*

11. Commission of bankruptcy resealed to correct a mistake in a name, if not opened. *S. C.*

12. A petition attested by the agent of the attorney for the petitioner, and authenticated by his attorney, is a sufficient compliance with the general order of the 12th August, 1809. *Ex parte Bellott, 2 Mad. 259.*

13. Affidavits on petition in bankruptcy may be filed after

PRINCIPAL AND AGENT.

the petition day, but the petition in such case stands over to give time to answer them. *Ex parte Sparrow, 2 Madd. 184.*

14. In an action by the plaintiffs A and B, as the assignees of C, v. E, a notice to produce a document is entitled A and B, assignees of C and D, v. E, this is insufficient, although A and B are, in fact, the assignees of C and D. *Harvey v. Morgan, 2 Starkie 17.*

15. A person who is interested in a commission of bankruptcy, and the proceedings under it, is entitled to have them produced in a collateral cause. *Coker v. Templar, 2 Starkie 260.*

PRINCIPAL AND AGENT.

1. An agent cannot dispute the title of his principal; and therefore, where a ship originally belonged to one of two partners, and had been conveyed to B for securing a debt, and B became the sole registered owner of the ship, and afterwards as agent for both partners insured the ship and freight, and charged them with the premiums, &c. and on a loss happening received the money from the underwriters: Held, that he was accountable to the assignees of the surviving partner for the surplus, after payment of his own debt, and not to the executors of the deceased partner, to whom the ship originally belonged. *Dixon and another v. Hamond, 2 Barn. and Ald. 310.*

PRINCIPAL AND SURETY.

PRINCIPAL AND SURETY.

See *Partners*, 37.

1. If a surety become bankrupt, the creditor, cannot, under the 49 Geo. III. c. 121, s. 8, prove the debt, if it became due after the bankruptcy. Ex parte *Mac Millan* re *Sowerby*, 1 *Buck* C. B. 287.

2. It is competent for creditors executing a deed of composition with the principal debtor, and certain of his sureties, to reserve their remedies against other sureties. Ex parte *Carstairs* re *Slade*, 1 *Buck* C. B. 560.

3. If a creditor execute a deed of compromise with the principal debtor, he thereby discharges the surety. Not so, if it be stipulated in the deed of composition, that the remedies against the sureties shall be reserved. Parol evidence of the understanding of the parties to the deed, that the remedies against the sureties should be reserved, cannot be admitted. Ex parte *Glendinning* re *Renton*, 1 *Buck* C. B. 517.

4. A surety in an annuity deed, who is compelled by the annuity creditor, after the bankruptcy and allowance of the certificate of the principal, to pay several sums for arrears, due after the issuing of the commission, is not within statute 49 Geo. III. c. 121, s. 8, and therefore may have an action against the principal for such sums, and hold him to bail—*Welsh* v. *Welsh*, 4 *Maul* and *Sel.* 833.

5. Bail to the sheriff are not

PROBATE.

sureties within the statute 49 Geo. III. c. 121, s. 8. *Hewes* v. *Motts*, 6 *Taunt.* 329.

6. If a surety enter into a bond with a principal, conditioned for the performance of covenants contained in an agreement for a lease, such surety is still liable, although the principal become bankrupt and be discharged under the 49 Geo. III. c. 121, s. 19. *Inglis* v. *Macdougall*, 1 *Moore* 196.

7. The plaintiff, holding a bill of exchange as a security from three partners, after the dissolution of the copartnership, and after the bankruptcy of one of them, takes the notes of one of them as a collateral security, without the knowledge of the other partners, and retains the original security in his hands. This does not discharge the other partners. *Bedford* v. *Deakin*, 2 *Starkie* 178.

8. A surety under an annuity deed, is not entitled under 49 Geo. III. c. 121, s. 8, to prove the value of the annuity as a debt under the commission: and therefore, where such a surety had redeemed the annuity subsequently to the bankruptcy, it was held, that he was entitled to maintain an action for the value against the bankrupt who had obtained his certificate; and that although the grantee had proved under the 17th section. *Flanagan* v. *Watkins*, 3 *Barn.* and *Ald.* 186.

PROBATE.

See *Petitioning Creditor*, 9, 10.

PROCEDENDO.

PROCEEDINGS.

See *Evidence*, 9, 10, 21.
Practice, 15.

1. The Lord Chancellor has a right to look at the proceedings. *Ex parte Scott re Nias*, 1 *Buck C. B.* 280.

2. No lien on the proceedings under a commission of bankruptcy for the fees of enrolment. *Ex parte Sanderson*, 19 *Ves.* 161.

3. Commission of bankruptcy superseded, and an action brought, the Lord Chancellor ordered the commission and proceedings to be delivered by the solicitor to the secretary, and by him to the associate, to be produced on the trial; with liberty to inspect and copy. Such an order properly refused by a judge. *Ex parte Warren*, 19 *Ves.* 162.

4. Proceedings in bankruptcy ordered to be deposited in the office, sometimes with a view to a criminal prosecution, as for a conspiracy: so if the bond is assigned: which remedy, as being limited to the penalty, is less beneficial than an action on the case. *Ex parte Warren*, 19 *Ves.* 163.

PROCEDENDO.

See *Vice Chancellor*, 1.

1. The Lord Chancellor can direct the Vice Chancellor to hear a petition for a writ of procedendo to issue, where a commission has been superseded on the Vice Chancellor's order confirmed by the Lord Chancellor. *Ex*

PROOF.

parte Hurd re Partington, 1 *Buck C. B.* 45.

2. The form of the writ of procedendo. 1 *Buck C. B.* 260.

PROHIBITION.

See *Jurisdiction*, 10.

PROMISSORY NOTE.

See *Limitations, Statute of* 1.

The holder of promissory notes payable in cash or Bank of England notes, who did not receive them immediately from the maker; Held, not entitled to prove the amount, as for money had and received against the estate of the maker. *Ex parte Davison re Seaton*, 1 *Buck C. B.* 31.

PROOF.

See *Consideration*, 1.

Partners, 6, 7, 27.

Promissory Notes, 1.

Principal and Surety, 1.

Bills of Exchange, 7, 8, 20, 21.

Executor, 1.

Marriage Settlement, 1, 4.

Annuity, 2, 3, 4.

Assignee, 16.

Bank of England, 1.

Covenant, 1.

Pledges, 1.

Lessor and Lessee, 3.

1. Petitioning creditor permitted to prove his debt by affidavit, under special circumstances. *Re Graham*, 1 *Buck C. B.* 47.

2. A debt arising out of a contract to convey British goods to a market in an enemy's country, cannot be proved under a commission of bankrupt, after peace

PROOF.

has been established between that country and Great Britain. Ex parte *Schmaling re Aldebert and Co.* 1 Buck C. B. 93.

3. If, in a marriage settlement, the bankruptcy of the husband be made the event, upon which the sum agreed to be settled by him shall become payable to the trustees, the proof of the trustees under his commission will be limited to the amount of the wife's fortune which he has received. Ex parte *Young re Lark*, 1 Buck C. B. 179.

4. A, being indebted to B, gives him a check upon his bankers to pay him in a bill at three months. The bankers draw a bill for the amount upon their correspondents in London, who accept it. The drawers and acceptors become bankrupt, and B proves and receives a dividend under both commissions. Held, that B was entitled to prove his debt also under A's commission. Ex parte *Rathbone re Browne*, 1 Buck C. B. 215.

5. A guarantees B and Co. against any loss they may happen to suffer, on account of the non-payment of an instalment by certain joint debtors of B and Co. One of the joint debtors becoming bankrupt, B and Co. under an order for the proof of joint debts under his separate commission, prove the amount of the instalment, and receive a dividend. Ordered, that the benefit of the future dividends on the proof be sold, and the produce paid to B and Co. and that the monies so received by them, together with the amount of the former divi-

dend, be deducted from the instalment; and that B and Co. might prove for the difference under A's commission. Ex parte *Reid re Ritchie*, 1 Buck C. B. 239.

6. Where debts were secured by a deposit of hops, the court directed a value to be set upon them, according to the market price of the day of the choice of assignees, and permitted the creditors to prove for the difference between the price so fixed and the debts secured, and to vote in the choice of assignees. Ex parte *Greenwood re Felton*, 1 Buck C. B. 323.

7. W carrying on a separate trade, is also in partnership with G, under the firm of G and Co. W, in his separate character, being indebted to G and Co. gives that firm a bill of exchange, drawn by O and Co. and accepted by him. G and Co. being largely indebted on a drawing account to F and Co. pay the bill to them, who endorse it to D and Co. O and Co. compound with their creditors. W, G and Co. and F and Co. become bankrupts. D and Co. by the composition and by proving under the commission of W, and F, and Co. receive twenty shillings in the pound, upon the bill. Held, that although G and Co. were only indebted to F and Co. in respect of their acceptances, and which F and Co. had not taken up when they became bankrupts; yet, that the assignees of F and Co. were entitled to stand in the place of D and Co. in respect of the proof made

PROOF.

by them under W's commission, to the extent of the dividends paid to D and Co. under F and Co's commission. *Ex parte Greenwoodre Whateley*, 1 *Buck C. B.* 237.

8. Proof under a commission is equivalent to payment; therefore, when solicitors had obtained an order to have their bill taxed, and to prove for the amount, it was held, that they had relinquished their lien upon the papers in their hands belonging to the bankrupt. *Ex parte Hornby re Tarleten*, 1 *Buck C. B.* 351.

9. Where some of the members of a firm are trustees of funds, which they misapply by making use of them for partnership purposes; if such misapplication be with the knowledge of the other members of the firm, the *cestui que trusts* may prove against the joint estate. *Ex parte Heaton re Moxon*, 1 *Buck C. B.* 386.

10. If a creditor, as an additional security for his debt, take the bankrupt's acceptances, it is his duty, when he proves the debt, to state that fact to the commissioners. Where a creditor had not done so, the proof was ordered to be expunged, with liberty for him to go again before the commissioners, and tender his proof. *Ex parte Hossack re Cliffe*, 1 *Buck C. B.* 390.

11. Where it was agreed between a mother and a son, that she should join in conveying her life-interest in an estate to a purchaser, the son undertaking in consideration thereof, to secure to her an annuity; but after the

execution of the conveyance, and before the annuity was secured, the son became bankrupt. Held, that the mother was not entitled to prove for the value of her life estate, but only for the value of the annuity, and the arrears at the date of the bankruptcy. *Ex parte Brockliss re Brockliss*, 1 *Buck C. B.* 406.

12. If an executor, who is directed to carry on his testator's partnership trade, exceed his authority by employing the assets in the trade, to an extent not warranted by the will; and the surviving partner, and the executor, become bankrupt, the excess of the assets so employed, may be proved by the executor under their commission. *Ex parte Richardson re Hodson*, 1 *Buck C. B.* 421.

13. Notes bought up after the bankruptcy of the maker, cannot be proved, unless it be shewn that the persons from whom they were purchased, were individually entitled to a proof in respect of the notes. *Ex parte Rogers re Bowles*, 1 *Buck C. B.* 490.

14. Proof cannot be mounted on proof. *Ex parte Smith re Sheath*, 1 *Buck C. B.* 492.

15. If an assignee, who has received effects, become bankrupt, a creditor under the commission in which he was assignee, but who proved his debt after the bankruptcy of the assignee, is not entitled to any proof under the assignee's commission. *Ex parte Stonehouse re Moore*, 1 *Buck C. B.* 531.

16. Two of three assignees become bankrupt. The solvent

PROOF.

assignee pays a debt due from the three to the estate. Held, that he is entitled to prove a third of the debt against each of the other assignees' estates. If either of the estates should prove deficient, quære whether he can prove a moiety of the deficiency against the estate of the other assignee. Ex parte *Hunter re Jackson*, 1 *Buck C. B.* 552.

17. Husband and wife assign to two creditors of the husband a contingent interest, to which the wife would be entitled, if she survived a particular person. The creditors ensure the wife's life. She dies before the contingent interest fell in, and the creditors receive the insurance money. The husband being a bankrupt, the creditors only allowed to prove the amount of what was due to them, after deducting the money received from the insurance office, minus the sum paid for the insurance and expenses. Ex parte *Andrews re Emett*, 1 *Mad.* 573.

18. Creditor who has not proved cannot petition to supersede a commission. Ex parte —, 2 *Mad.* 281.

19. On marriage of W. W., then in good circumstances, he gave a bond to trustees for £4000, conditioned to pay them £2000 within one month after demand, and for payment to them in the mean time of interest upon the £2000, by half-yearly payments upon such trusts as were contained in an indenture of settlement. By the settlement it was provided, that the trustees should not call in or demand payment of the

£2000, or any part thereof, during the life of W. W. The interest of the £2000 was several years in arrear. W. W. afterwards became a bankrupt, never having consented to a demand upon him for the £2000. Held, the £2000 was proveable against the separate estate of W. W. Ex parte *Elder*, 2 *Mad.* 282.

20. A creditor having joint property of bankrupt's in pledge, and selling the same after the bankruptcy, may notwithstanding prove the remainder of his debt, under the separate estate of the bankrupt, if there is no other joint property. Ex parte *Geller*, 2 *Mad.* 262.

21. Corporations may prove debts under commissions of bankruptcy by the affidavit of a person authorized by a general power of attorney, and vote in the choice of assignees by a person authorized by a special power of attorney under their common seal. Ex parte *Bank of England*, 1 *Swan.* 10.

22. Proviso in a deed of composition, that, in case of default of payment, or if a commission of bankruptcy should issue, the covenants to accept the composition should be void, and the creditors be paid, or prove their whole debts, deducting only what had been received. Upon bankruptcy after breach and a subsequent part payment, the creditors were held entitled to prove the whole residue of their debts, according to the proviso, retaining what they had received. Ex parte *Vere*, 19 *Ves.* 93.

23. A bond was conditioned

PROOF.

for the payment of a sum of money to the executors of the obligor, and of the interest during his life, payable on certain days, or within twenty days after demand. The obligee became bankrupt, and interest was then due, but no demand had been made. Held, there having been no forfeiture, that the bond did not constitute a debt proveable under the commission. Held, secondly, that it was not proveable as an annuity bond, within the meaning of 49 Geo. III. c. 121, s. 17. *Winter v. Mousely*, 2 Barn. and Ald. 802.

24. Sale of goods to be paid for at the end of the year in which they were purchased; but if paid for before the end of the year, 20 per cent. discount to be allowed. They were not paid for within the year, and held on the bankruptcy of the purchaser that proof could not be made of the whole debt, without deduction for discount. Ex parte *Pigou* re *Harvey*, 3 Mad. 136.

25. Bankrupt, before his bankruptcy, on a loan of stock, gave a bond to re-transfer the principal within three years, and pay the amount of the dividends in the mean time, and also agreed to convey a real estate as a security. No re-transfer was made, nor any dividends paid. Held, that on his bankruptcy, the security should be sold, the dividends paid out of the produce, and that stock should be purchased; and if not sufficient to re-purchase the whole principal stock, that proof should be made under the separate estate for the remainder;

and that the assignees were not entitled to have three years to re-transfer the stock. Ex parte *Fisher* re *Barker*, 3 Mad. 159.

26. Proof in bankruptcy upon a bill reduced by the previous part payment or declaration of dividend from the estate of another party; unless in a special case, as where it was pending a petition against the rejection of the proof for the whole amount; which decision of the commissioners was overruled. Ex parte the *Royal Bank of Scotland*, 19 Ves. 310.

27. Stipulated price for redemption of an annuity not the criterion of the value to be proved in bankruptcy. Ex parte *Thistlewood*, 19 Ves. 255.

28. Annuity, part of the price of an estate, for the life of the grantee, aged thirty-two, taken at an under-value, from his state of health, then not insurable, but afterwards restored, and secured on bond and judgment. The value to be proved on the bankruptcy of the grantor two years afterwards, is, under the peculiar circumstances, not the market price; nor the price paid originally, with the variation occasioned by the lapse of time, (since established as the general rule, ex parte *Whitehead*, 1 Mer. 10, 127), but the actual value at the bankruptcy, with reference to the grantee's age and improved health, the price paid, and the enjoyment, as evidence of the value, not simply reducing it by the payments made; the contract involving a contingent risk with reference to the

PROOF.

grantee's health, which might have turned entirely against him. *Ex parte Thistlewood*, 19 Ves. 296.

29. Distinction, before the statute 49 Geo. III. c. 121, s. 17. authorizing proof in bankruptcy of annuities generally, between covenant, under which arrears only could have been proved, and a bond, under which, if forfeited before the bankruptcy, the value also might have been proved. *Ex parte Thistlewood*, 19 Ves. 249.

30. Originally under proof in bankruptcy upon the penalty of a bond, securing an annuity, forfeited, the annuity itself was received, if assets sufficient. The modern course to prove the value of the annuity as a debt, for convenience of distribution. *Ex parte Thistlewood*, 19 Ves. 245.

31. Proof was offered before the commissioners of a debt of £5000, which was refused. A petition was presented for leave to prove a debt of £10,000; but the Vice Chancellor observed, that as the petitioners had only offered to prove a debt of £5,000 before the commissioners, they could not petition for leave to prove a debt of £10,000; for it could not be considered as an appeal from their judgment, when ten thousand pounds was not offered to be proved before them. Petition dismissed. *Ex parte Frn*, 3 Mad. 132.

32. C and D were in partnership, and the same was dissolved. D carried on afterwards a trade, and became bankrupt, and C was

REGISTERING DEEDS.

insolvent. Held that the joint creditors of C and D could not prove against the separate estate of D. *Ex parte Janson re Corf*, 3 Mad. 229.

33. Where a firm of four persons become bankrupts, the creditors of a firm of three of such bankrupts may, under Lord Rosslyn's general order, prove under the commission against the four, and no order is necessary for that purpose. *Ex parte Worthington re Gray and others*, 3 Mad. 26.

34. Bankrupt, previous to the commission against him, procured persons to assign an interest in copyhold premises as a security to a creditor of his. The creditor may prove under the commission without delivering up such security. *Ex parte Goodman the younger re Goodman the elder*, 3 Mad. 373.

PROTECTION.

See *Bankrupt's Privilege*.

PROVISIONAL ASSIGNEE.

See *Action*, 6.

PUBLIC MEETING.

See *Commissioners*, 1.

1. A declaration made at a public meeting of all the creditors, will sanction a transaction, which otherwise would be bad if carried on in a private manner. *Ex parte Brine re Budgett*, 1 Buck C. B. 23.

QUANTUM DAMNIFICATUS.

See *Lease*, 4.

REGISTERING DEEDS.

See *Annuity*, 1, 4, 5.

RENT.

RELATION TO THE ACT OF
BANKRUPTCY.See *Action*, 3.*Payment after an Act of
Bankrupt*, 1, 2.

1. A sale of the property of a bankrupt after an act of bankruptcy, but more than two months before the commission issued, is, since the 46 Geo. III. c. 101, s. 1. a sale by the bankrupt and not by the assignee; and a creditor of the bankrupt having become a purchaser, was holden (in an action brought by the assignee for the value of the goods) to be entitled to set off against such claim, the debt due to him from the bankrupt, this constituting a mutual credit between the bankrupt and such creditor within the meaning of the 46 Geo. III. c. 101, s. 3. *Southwood v. Taylor*, 1 Barne and Ald. 471.

2. A, shortly before his bankruptcy, on being applied to by B, to whom he owed £47, to pay the debt, gave him a bill of exchange to get it discounted to pay his own debt, and pay over the surplus. Before the bill is discounted A becomes a bankrupt. B cannot retain the bill against the assignees. *Humphries v. Wilson*, 2 Starkie 566.

3. A cognovit given in an action for debt, interest and costs incurred after a secret act of bankruptcy is discharged by bankruptcy and certificate. *Vansandon v. Crosbie*, 1 Chitty 16.

RENT.

1. The general assignment of

SCRIVENER.

a bankrupt's personal estate under his commission, does not vest a term of years in the assignees, unless they do some act to manifest their assent to the assignment, as it regards the term, and their acceptance of the estate rents, &c. And, therefore, till some act of this sort is done by them, the term still remains in the bankrupt, and he is liable to the payment of rent accruing due subsequent to the bankruptcy. *Copeland v. Stephens*, 1 Barn. and Ald. 593.

RENEWED COMMISSION.

1. Renewed commission on the petition of a creditor, the bankrupt, the commissioners, and the assignees being dead. Ex parte *Hobbs re Tanner*, 1 Buck C. B. 134.

REPUTED OWNER.

See *Order and Disposition*.

RESEALING COMMISSION.

See *Practice*, 10, 11.

RESCUE.

See *Action*, 5.

SCANDAL AND IMPERTINENCE.

1. The court has the power to expunge scandalous and impertinent matter from its proceedings, wherever such matter may be found. Ex parte *Leigh re Biston*, 1 Buck C. B. 132.

SCRIVENER,

See *Attorney*, 1, 2.

SERVICE OF PETITION.

SECOND COMMISSION.

See *Certificate*, 21.

SECURITY.

See *Bills of Exchange*, 21.

Proof, 34.

Lien.

Mortgagor and Mortgagee.

1. Securities held by a banker against his acceptances, available to the bill holders, not directly, but through the equity of the acceptor, or the assignees under a commission of bankruptcy against him, to have them applied in discharge of the acceptances. Ex parte *Waring*, *Inglis*, and *Clarke*, 19 *Ves.* 345.

SEPARATE ESTATE.

See *Proof*.

SEPARATE CREDITORS.

See *Proof*.

SERVICE.

See *Order*, 1.

1. A person keeping out of the way to avoid the service of an order made upon petition in bankruptcy, it was ordered upon motion, that service at his office should be good service. Ex parte *Anderson re Platt*, 1 *Buck C. B.* 38.

SERVICE OF PETITION.

See *Certificate*, 4, 5.

Petition, 5, 14.

1. Order made, on motion, that service of a petition in bankruptcy on the attorney of a person

SET OFF.

abroad, whose debt was sought to be expunged, should be deemed good service. Ex parte *Palon re Anderson*, 3 *Mad.* 116.

2. A petition having been presented to expunge a debt, a motion was made that service on the agent, to whom the affidavit of debt was sent, might be deemed good service; and the same was ordered. Ex parte *Dunlop*, 3 *Mad.* 279.

SET OFF.

See *Relation to the Act of Bankruptcy*, 1.

1. A has a joint demand against B and C, who are also creditors of A. B, by letter, having made himself separately liable to A, on account of the demand originally joint, cannot, either at law or in equity, set off the joint debt due from A to himself and C. Ex parte *Ross re Fisher*, 1 *Buck C. B.* 125.

2. If a party neglect to plead a legal set off to an action, he is not entitled to the assistance of a court of equity to give him the benefit of the set off. *S. C.*

3. A, before his bankruptcy, discounts certain bills of exchange with B and Co. his bankers. They give him immediate credit for the value of the bills in his account, *minus* the discount. A balance is likewise struck before the bankruptcy, and whilst the bills were yet running in favor of A, when the bankers admit that they have in their hands £934:8:8 due to A, giving him credit for the bills then running. A becomes a bankrupt, and the

SET OFF.

bills are dishonored. Held, that in an action against the bankers for the balance admitted to be due to A before his bankruptcy, they have a right to set off against such claim the amount of the dishonored bills, it being a case of mutual credit under the 5 Geo. II. c. 30, s. 28. *Arboun and another, assignees of Gowen, v. Tritton and others*, 1 *Holt N. P. Rep.* 408.

4. Where an ensured, being indebted to an underwriter on a balance of accounts, becomes bankrupt, if a loss afterwards happen, the underwriter, in an action by the assignees, may deduct the balance due to him from the amount of his subscription. *Graham and others v. Russell*, 2 *Marsh* 561.

5. Set off and joint proof allowed in bankruptcy, under the circumstances. *Ex parte Huckle*, 1 *Mad.* 577.

6. Where defendant purchased, as broker for B, the goods of A, for whom he sold them under a *del credere* commission, and did not disclose at the time the name of A, but disclosed it soon after, and afterwards paid A the price.—Held, that in an action by the assignees of B to recover the balance due upon a resale of the goods made by the defendant on account of B, defendant was not entitled to set off either under statute 2 Geo. II. c. 22, s. 13, or 5 Geo. II. c. 30, s. 28, the payment made to A. *Morris and others, v. Cleasby*, 4 *Maul.* and *Sel.* 566.

7. A creditor of a partnership

having made farther advances on the security of a bill of exchange, deposited with him for that purpose by the partners, and having undertaken to receive the amount when due, and return the surplus, the bill having been dishonored, and remaining in his hands unpaid, is not entitled, on the bankruptcy of the partners, to set off his prior advances against a demand by the assignees for the bill. *Ex parte Flint*, 1 *Swan.* 30.

8. Where a broker effected a policy of insurance in the name of his principal, under a *del credere* commission, and guaranteed the solvency of the underwriters in the body of the policy, which was left in the custody of the assured until the broker had paid the loss according to the terms of the guarantee. Held, that a loss having happened before the bankruptcy of one of the underwriters, and adjusted afterwards, could not be set off by the broker in an action brought against him by the assignees to recover premiums due to the bankrupt, either as constituting a mutual debt or mutual credit, although the broker had accounted for such loss with the assured before the bankruptcy. *Peele v. Northcote*, 1 *Moore* 178.

9. The doctrine of set off and mutual credit under the statute is the same at law and in equity. *Ex parte Flint*, 1 *Swan.* 33.

10. Where a broker, indebted for premiums of insurance on policies subscribed by an underwriter, who had since become bankrupt, had a *del credere* com-

SET OFF.

mission on one of the policies, effected in the name, not of the broker, but of the assured, and expressed in the body thereof, whereon a loss happened before the bankruptcy, the broker not being entrusted with the custody of the policy, though the broker paid the loss to the assured before the commission. Held, that he could not set off that loss against the premiums due to the assignees of the bankrupt. *Peele v. Northcote*, 7 Taunt. 478.

11. An underwriter is entitled (where the assured has become bankrupt after the policy of insurance was effected) to deduct what was due to him before the bankruptcy, on a balance of accounts between the assured and himself, from out of the amount of his subscription to the policy, in the event of a loss subsequent to the bankruptcy, under the 5 Geo. II. c. 30, the statute 19 Geo. II. c. 32, s. 2 suspending the effect of a bankruptcy in the case of an assured and the underwriter, on both sides, so as to let in the former statute, till the result of the voyage shall have been ascertained, and the accounts stated; because the 19 Geo. II. c. 32, (admitting persons assured to claim losses against bankrupt underwriter, although happening after the bankruptcy), is *in pari materia*, and the two statutes are to be construed with reference to each other, so as to make them mutually beneficial; and therefore it was held, that a set off must be allowed to a solvent underwriter by the assignees of a bankrupt assured under the 5

Geo. II. c. 30. *Graham v. Russell*, 3 Price 227.

12. Semble that an insurance broker cannot set off, against premiums due to the assignees of a bankrupt, on policies underwritten by the bankrupt, losses which occurred before the bankruptcy, though the policy was effected in the broker's name as agent.—*Baker v. Langhorn*, 6 Taunt. 519.

13. Distinction between set off in equity and at law. In equity it prevailed long before the statute. Ex parte *Blagden*, 19 Ves. 467.

14. The benefit of a policy of insurance previous to the bankruptcy of the insured, upon a loss after it passes; and gives a right of action to the assignees, not capable of set off against a debt from the bankrupt. Ex parte *Blagden*, 19 Ves. 465.

15. A debt from a bankrupt to a married woman *dum sola*, cannot be set off against a debt from her husband to the bankrupt. *S. C.*

16. By a marriage settlement, monies belonging to the wife were vested in trustees, in trust to assign £1000 stock to the husband, and to invest the remainder in government securities; and in case the husband should survive the wife, and there should be no issue of the marriage, to transfer one moiety of the trust stock to the husband, if he should survive his wife; and to transfer the other moiety to the nearest and next of kin of the wife, in equal shares amongst them. The husband covenanted

SHIP REGISTRY ACTS.

that if his wife should die in his life time without having issue to survive her thirty days, he would, within three months after her decease, transfer £500 Bank annuities to the trustees, "for the sole use and property of the nearest and next of kin" of the wife. The husband having become bankrupt in his wife's life-time—Held, 1st. That his moiety of the trust stock could not be retained or set off in satisfaction of his covenant: and 2dly. That the covenant did not create a debt proveable under the commission. *Brandon v. Brandon*, 2 *Wilson*. 14.

SHERIFF.

See *Execution*, 1.

1. An action having been brought against the sheriff, by the assignees of a bankrupt, for taking goods after the bankruptcy, on a writ issued out of C. P. in which court time had been given to return the writ: this court staid the proceedings until an indemnity was given, on the terms of paying over to the assignees the money levied, and the costs of the action against the sheriff. *Probinia v. Roberts*, 1 *Chitty* 577.

SHIP REGISTRY ACTS.

See *Power of Attorney*, 1.

Order and Disposition, 5, 9, 13, 14.

Principal and Agent, 1.

1. If the names of two partners in trade, appear (among

others) on the certificate of registry, as owners of a ship, the registry acts do not prevent the showing how and in what proportions the several owners are respectively entitled, and though the partners may derive title under different conveyances, yet if their shares were purchased with the partnership funds, and treated by them as partnership property, and the partners become bankrupt, these shares will be considered as the joint property. *Ex parte Jones and others*, 4 *Maul.* and *Sel.* 450.

2. The bill of sale passes the absolute property in a ship at sea, subject only to be divested in case of the endorsement on the certificate of registry not being made within ten days after the return of the ship to port. Power of attorney to sign an endorsement on the certificate, not revoked by bankruptcy of the vendor subsequent to the execution of the power, but previous to the endorsement: being a power only to do a mere formal act, which the bankrupt himself might have been compelled to execute notwithstanding his bankruptcy, and for a valuable consideration. Therefore in this case the endorsement on the certificate being made within the ten days under a power of attorney, the grantor of which had since become bankrupt—Held, a sufficient compliance with the terms of the registry act. *Dixon v. Ewart*, 3 *Meri.* 322.

3. The 21 *Jac.* l. c. 19, s. 11, is not repealed as to shipping by the ship register acts; and there-

SHIP REGISTRY ACTS.

fore when A, the owner of a ship, duly assigned his interest in it to B, and B became the registered owner, but by his permission A continued to have the same in his possession, order, and disposition, until he became bankrupt: Held, that the property in the ship passed to A's assignees, under the statute of *James*. *Hay v. Fairbairn*, 2 *Barn.* and *Ald.* 193.

4. A and B, owners of a ship, executed an absolute bill of sale to C and D, for a nominal consideration. There was a parol agreement between them, that C and D should accept bills for the accommodation of A and B,—that the ship should be a security to C and D, for any advances they should make on such acceptances, and that until default made by A and B, in providing for the acceptances, the ship should remain in their possession and management. The ship was registered in the names of C and D, but A and B remained in the possession and management of her, appeared to the world as owners, and obtained credit from appearing so. Before default was made by A and B, in providing for the acceptances, C and D became bankrupts, and their assignees immediately seized and sold the ship. A and B afterwards became bankrupts.—Held that trover for the ship could not be maintained by their assignees against the assignees of C and D; for the parol agreement could not be set up against the bill of sale, and the case did not come within the statute of *James*, the

SOLICITOR.

ship having been seized by the defendants before the bankruptcy of A and B; and though the bill of sale, unaccompanied by possession, might be void as against creditors, it was binding upon A and B, and their assignees. *Robinson v. Mac Donnel*, 2 *Barn.* and *Ald.* 134.

5. No lien on a ship abroad can be created by parol, nor by bills of exchange drawn by the master, unless upon mistake clearly established, the instrument can be corrected: as in the case of a joint bond, intended to be joint and several. *Ex parte Halket*, 19 *Ves* 474.

SHORT BILLS.

See *Bills of Exchange*, 5, 6, 11.

1. Order on a provisional assignee to deliver up short bills, leaving a sufficient amount to answer acceptances on account of the petitioners, and indemnifying the estate against any possible loss upon them: an extent being otherwise satisfied. *Ex parte Buchanan*, (*Glasgow Bank*), 19 *Ves* 201.

SOLVENCY.

See *Evidence*, 12.

SOLICITOR.

See *Concerted Commission*, 2.

Costs, 1.

Proof, 8.

Petitioning Creditor, 4.

Witness, 3.

Solicitor to the Commission.

Solicitor's Bill of Costs.

SOLICITOR TO THE COMMISSION.

SOLICITOR TO THE COMMISSION.

1. The solicitor to a commission restrained by injunction from negotiating and from proceeding in an action on a promissory note that he had received from the bankrupt for his bill of costs, in procuring his certificate, the bankrupt having purchased the debts of many of the creditors, and the solicitor being indebted to the estate in such a sum that the share of it coming to the bankrupt standing in the place of the creditors in respect of debt so purchased by him, would exceed the amount of the promissory note. *Ex parte Harding re Hunt*, 1 *Buck C. B.* 24, 37.

2. It is the duty of the solicitor to the commission to protect the estate against his own demands. *Ex parte Story re Story*, 1 *Buck C. B.* 74.

3. Solicitor's bill of costs, where the charges were *prima facie* exorbitant—Ordered to be taxed after payment made, and after the death of the assignee who paid it. *Ex parte Neale re Norton*, 1 *Buck C. B.* 111.

4. Held, that a solicitor must pay the costs of the taxation of his bill reduced by the taxation more than one sixth of the amount, which reduction arose from the master disallowing extra fees paid to the commissioners for travelling expenses. *Ex parte Inman re Inman*, 1 *Buck C. B.* 129.

5. A solicitor engaged in carrying on legal proceedings for a

client who becomes bankrupt, pending the proceedings, cannot charge his estate with the costs incurred subsequent to the bankruptcy. *Ex parte Miller re Garland*, 1 *Buck C. B.* 26.

6. It is of course upon an *ex parte* application to have an order to tax a solicitor's bill. If the solicitor wish to modify or discharge the order, he must apply to the court for that purpose. *Ex parte Hewett re Morris*, 1 *Buck C. B.* 388.

7. Where the amount of a solicitor's bill, up to the choice of assignees, is *prima facie* exorbitant, it is of course to refer it to the master to be taxed. *Ex parte Emery re Chard*, 1 *Buck C. B.* 422.

8. The petitioning creditor and not the solicitor is liable to the messenger under a commission of bankrupt for the costs and expenses attending it. The solicitor is an agent merely, and is not to be regarded as a principal as respects the messenger, and although he make himself responsible to the messenger, the petitioning creditor will not therefore be exonerated, without the express consent of the messenger to discharge him. *Hart v. White*, 1 *Holt N. P. Rep.* 376.

9. Solicitor on his own behalf presenting a petition in bankruptcy. Attestation dispensed with. *Ex parte Kingdon*, 1 *Mad.* 446.

10. It is no defence to an action by a solicitor against an assignee under a commission of bankrupt, that the commission was sued out under a misrepre-

SOLICITOR'S BILL OF COSTS.

sentation by the plaintiff, that the commission would be operative in the Isle of Man, and that it has been wholly fruitless; for the commission cannot be treated as a mere nullity. *Pasmore v. Birnie*, 2 *Starkie* 59.

11. Where the town agents of a country solicitor, (since a bankrupt) had received papers from him, belonging to his client, for the purposes of the client's business; they have a lien on them as against the client, for the amount of money due from him to the solicitor, and from the solicitor to them on account of business done in the cause. And where the client had, after the solicitor's bankruptcy, paid the agent so much money to obtain such papers, although an action had been previously brought against him by the assignees for the recovery of it: the court granted and continued an injunction against the action, on the ground of the agent's lien. *Bray v. Hine*, 6 *Price* 203.

SOLICITOR'S BILL OF COSTS.

See *Jurisdiction*, 5.

Solicitor to the Commission, 3, 4, 6, 7, 11.

1. One sixth of a bill of costs, in bankruptcy, delivered to the master to be taxed, being taken off, the solicitor ordered to pay the costs of the taxation. Ex parte *Hatherway* re *Hatherway*, 2 *Mad.* 329.

2. A bill of costs by a solicitor under a commission of bankruptcy, though approved by the com-

SPECIFIC PERFORMANCE.

missioners and stated and allowed in the accounts of the assignees, held to be taxable under 5 *Geo. II. c. 30, s. 46*. Ex parte *Gregson*, 3 *Mad.* 49.

3. A charge for preparing an affidavit of the petitioning creditor's debt and bond to the Chancellor, in order to obtain a commission of bankruptcy, is not a taxable item in an attorney's bill within 2 *Geo. II. c. 23, s. 23*, as being a charge at law or in equity, the affidavit not having been sworn, nor a commission issued. *Burton v. Chatterton*, 3 *Barn.* and *Ald.* 486.

SPECIFIC PERFORMANCE.

1. Where the validity of a deed depends upon the *bona fides* of the transaction, to be collected from extrinsic circumstances, a court of equity will not compel a purchaser to accept a title under the deed, because neither the purchaser nor the court has adequate means of ascertaining those circumstances. *Hartley v. Smith*, 1 *Buck C. B.* 368.

2. Specific performance decreed of a contract for the purchase of a debt. *Wright v. Bell*, 1 *Daniell* 95.

3. A trader makes a conveyance of all his real and personal property to trustees, to sell for the benefit of his creditors, under which the trustees contract to sell certain lands to defendant. The contract not being completed, they file a bill against defendant for a specific performance; but before answer, the trader becomes bankrupt, and his assign-

STOPPAGE IN TRANSITU.

nees file a supplemental bill to enforce the contract. Held, that although the conveyance to the trustees was an act of bankruptcy, the assignees may compel the performance of the contract made under it. *John Goodwin v. John Lightbody*. 1 *Daniell* 153.

STAMPS.

1. A petition in bankruptcy praying distinct orders under several commissions, requires several stamps. *Ex parte Wilson*. 18 *Ves.* 439.

STOCK.

See *Order and Disposition*, 4.
Appropriation, 1.
Proof, 25.
Partners, 21, 24.

1. Stock secured by bond, and the collateral security of real estate, to be replaced at the end of three years, and in the mean time the dividends to be paid as they accrued due. The dividends are not paid; afterwards, and before the expiration of the three years, the obligor becomes a bankrupt. Held, that the obligee was entitled to have the proceeds of the sale of the real estate, immediately laid out in the purchase of stock, without waiting the expiration of the three years. *Ex parte Fisher re Barker*, 1 *Buck C. B.* 188.

STOPPAGE IN TRANSITU.

See *Action*, 2, 4.

1. A trader in London was in

the habit of purchasing goods at Manchester, and exporting them to the continent. Shortly after their arrival in London, the goods consigned to him remained in the waggon office of the defendants, who were carriers, until they were removed by his agent for the purpose of being shipped. Held, that such trader having become bankrupt, the assignees were entitled to recover goods deposited with the defendants before the bankruptcy, and that the consignee had no right to stop them in transitu, as the trader had no warehouse of his own. Held also, that the transitus of the goods was at an end on their arrival at the waggon-office. *Rowe v. Pickford*, 1 *Moore* 526.

2. A resale of goods by a vendee and payment to him, does not destroy the vendor's right of stoppage in transitu. *Craven v. Ryder*, 6 *Taunt.* 433.

3. If a carrier, after notice from the vendor, of goods to stop them in transitu, by mistake delivers them to the vendee, the sale is nevertheless rescinded, and the vendor may bring trover for them against the vendee.—*Litt. v. Cowley*, 7 *Taunt.* 169.

4. And though the vendee having become a bankrupt, the goods have passed into the hands of his assignees, yet inasmuch as they did not come to the possession of the bankrupt with the consent of the true owner, they are not in the order and disposition of the bankrupt within the statute 21 *Jac. I. c. 19. s. 11. S. C.*

SUPERSEDEAS.

SUBPENA DUCES TECUM.

See *Practice*, 7, 8.

SUIT IN EQUITY.

1. The plaintiff in a suit becoming bankrupt, the assignees ordered, within a fortnight after, notice to file a supplemental bill, or the bill to stand dismissed. *Porter v. Cox*, 1 *Buck C. B.* 469.

SUPERSEDEAS.

See *Concerted Commission*, 1, 3, 4, 5.

General Orders, 3.

Evidence, 6, 18.

Proof, 18.

1. The court can act upon affidavit of service of the petition, in cases of supersedeas as well as in other cases. *Ex parte Crump re Bell*, 1 *Buck C. B.* 4.

2. The commission of a petitioning creditor, who, with the knowledge of two or three of the creditors, received his debt from the bankrupt, superseded under the statute 5 *Geo. II. c. 30, s. 24.* at the petition of a creditor privy to the transaction. Whether that creditor will be permitted to sue out a new commission, *quære.* *Ex parte Brine re Budgett*, 1 *Buck C. B.* 19.

3. Where several commissions have issued against partners, the court will, if it be for the interest of all parties, remove the first out of the way, either by superseding them, or by making such arrangements as to render it impossible to take advantage of the objection to the subsequent com-

mission. *Ex parte Wilson and Todd re Colbeck*, 1 *Buck C. B.* 52.

4. When sales of the estate have taken place, the court will not supersede the commission upon twenty shillings in the pound being paid to all the creditors. *Two good v. Hankey*, 1 *Buck C. B.* 67.

5. It is in the discretion of the court to supersede a commission, whether the bankrupt has or has not got his certificate under it; but the court would not do so upon the petition of joint creditors, (who suffered a considerable time to elapse without having obtained an order to prove, for the purpose of assenting to or dissenting from the certificate) in a case where the certificate was lying for confirmation, and no misconduct was imputed to the bankrupt. *Ex parte Cutten re Hughes*, 1 *Buck C. B.* 68.

6. A separate commission directed to a joint creditor, who acted under the commission, and permitted his debt to be proved without an order from the Lord Chancellor, superseded at the cost of the petitioning creditor. *Ex parte Story re Story*, 1 *Buck C. B.* 70.

7. To supersede a commission after certificate allowed, unless the invalidity appear upon the proceedings, a case of fraud must be made out. *Ex parte Levi re Sutton*, 1 *Buck C. B.* 75.

8. When a bankrupt is in a situation to try the validity of his commission at law, the court will leave him to his action, putting him upon terms as to the time of

SUPERSEDEAS.

the trial. *Ex parte Billiald re Billiald*, 1 *Buck C. B.* 220.

9. If fraud be established, the court will supersede the commission before the finding of the commissioners. So where a commission was sued out upon the petition of the trustee of an equitable creditor, who had signed a composition deed with the bankrupt, the court superseded the commission. *Ex parte Battier re Battier*, 1 *Buck C. B.* 426.

10. If it appear by the petition of a creditor to supersede a commission that an action is commenced to try its validity, the court will not supersede the commission till the event of the trial is known. *Ex parte Price re Lane*, 1 *Buck C. B.* 230.

11. On the petition of the bankrupt, the commission superseded the act on which the adjudication was made, being invalid, and there not being an affidavit of any other act. *Secus* if there had been such an affidavit. *Ex parte Burgess re Burgess*, 1 *Buck C. B.* 233.

12. A bankrupt presents a petition to supersede his commission, and then dies before the last meeting of the commissioners, without having surrendered himself. The petition is revived by his personal representative. The commission ordered to be superseded. *Ex parte Whittington re Whittington*, 1 *Buck C. B.* 235.

13. The supersedeas divests the estates conveyed to the assignees by the bargain and sale of the commissioners. *Ex parte Smith*, 1 *Buck C. B.* 262.

14. If, in issuing a commission, the petitioning creditor be influenced by motives not fraudulent, although other than the mere distribution of the estate, the court will not on that account supersede the commission. *Ex parte Wilbeam re Wilbeam*, 1 *Buck C. B.* 459.

15. Commission of bankruptcy not superseded without consent of all the creditors who had proved, certified by the commissioners, and affidavits of the bankrupt's confirmation of all purchases under the commission. Consent of creditors, who had received twenty shillings in the pound, not dispensed with. *Ex parte Milner*, 19 *Ves.* 201.

16. A commission issued to a place where there were only two creditors, and distance two hundred miles from the great body of the creditors. Refused to be superseded on that account; but time enlarged for the choice of assignees. *Ex parte Fellows re Doubleday*, 2 *Mad.* 141.

17. When a petition to supersede a commission is presented by a bankrupt, and an issue is directed, the court will order the petition to stand over until such a fixed time as in all probability the issue will be tried; and that if from any circumstance the trial at law does not take place within the prefixed period, the bankrupt must make an affidavit satisfactorily accounting for the delay of the trial, otherwise his petition will be dismissed. *Ex parte Ranken*, 3 *Mad.* 371.

18. When it appears by the petition that an action has been

SURPLUS.

brought, in which the validity of the commission will be tried, the court will not supersede the commission, but give the petitioner leave to bring on his petition again when that action shall have been tried. *Ex parte Price re Lane*, 3 *Mad.* 228.

19. A commission will not be superseded on account of a misdescription of the bankrupt, if he is well known as described in the commission. *Ex parte Horsley* and another *re Green*, 2 *Mad.* 11.

SURETY.

See *Principal and Surety*.

SURPLUS.

1. Where a man is a partner in separate firms, each of which becomes bankrupt, the surplus of his separate estate shall be applied in discharging the joint debts of the firms in proportion to the whole amount of the debts proved against each firm respectively. *Ex parte Franklyn re James*, 1 *Buck C. B.* 332.

2. The usual order having been obtained to take the accounts of the joint and separate estate under a separate commission, the joint estate paid seventeen shillings, and was sufficient to pay the remaining three shillings in the pound, leaving a surplus in the hands of the assignees. Upon taking the partnership accounts, a balance appeared in favor of the solvent partners. The separate estate had paid three shillings in the pound. Held, that the bankrupt
Vol. I. A A A

TAXATION.

was not entitled to an allowance under the 5 *Geo II. c. 30, s. 7*: and held, that the surplus of the joint estate was to be paid to the solvent partners, and if it proved insufficient, they were to be at liberty to prove against the separate estate for the difference. *Ex parte Terrell re Taylor*, 1 *Buck C. B.* 345.

SURRENDER.

See *Supersedeas*, 12,
Felony, 1.
Bankrupt, 4.

1. The petition of the personal representative of a bankrupt, who had died after the last meeting of the commissioners, without having surrendered, dismissed. *Ex parte Gardiner re Sabatier*, 1 *Buck C. B.* 458.

2. If a bankrupt die without surrendering, a petition presented by his representative to supersede the commission cannot be heard, unless it make out a case that would induce the court to permit a surrender if the bankrupt were living. *Ex parte Crowther re Crowther*, 1 *Buck C. B.* 480.

3. A bankrupt in prison for debt is entitled to be carried before the commissioners, that he may surrender himself at the expense of the estate, notwithstanding he might, upon a summary application, have obtained his discharge. *Ex parte Emery re Emery*, 1 *Buck C. B.* 527.

TAXATION.

See *Solicitor*.
Solicitor's Bill of Costs.

TRADING.

TERM OF YEARS.

See *Rent*, 1.

TRADING.

See *Attorney*, 1, 2.

Deceased Traders, 1.

Partnership, 30.

Commission, 14.

Evidence, 21.

1. A, an officer of the army, retires to the country, where he rents a dwelling house and three acres of land, buys pigs, and consumes part in his family, and sells the rest at a neighbouring market. He makes no show as a dealer, and is proved not to have bought more than fourteen pigs in any one year.—Held, that he was a trader within the bankrupt laws. The smallness of the profit is no consideration, and one act of buying and selling is sufficient to constitute a trader. *Newland v. Bell*, 1 *Holt*, N. P. *Rep.* 221.

2. A cowkeeper, all his transactions of buying and selling being incidental to the occupation of farmer, grazier, or drover, is exempted from the operation of the bankrupt laws by the statute 5 *Geo. II. c. 30, s. 40*. *Carter v. Dean*, 1 *Swan*. 64.

3. One who occupied lands for the purpose of keeping cows, the milk of which he sold, and when they ceased to yield milk, fattened and sold the cows, and bought others for the like purpose, and who also sold calves, was held not to be a trader within the bankrupt laws. *Carter v. Dean*, 1 *Wilson* 85.

4. A testator, entitled, by lease of unequal duration, to iron mines and works, by will gave a pecuniary legacy to B, as a capital for him "to become a partner with my executor, of one fourth share in the trade of all these works, as long as the lease endures," and all his real and personal estates to H and his wife, and appointed H executor. By a codicil he gave to C 3-eighths of the concern at his iron works and of the premises at C: so the partnership will stand, at my demise, C 3-eighths, H 3-eighths, B 2-eighths."—Held, 1st. that this did not create a partnership co-extensive with the duration of the leases. 2d. That by the codicil 3-eighths of the mines, &c. became vested in H solely, and were taken out of the operation of the general devise in the will to H and his wife. G, H, and B jointly carried on the works for two years after the testator's death, selling iron manufactured by them not only from ore procured from the testator's mines, but from ore and old wrought iron which they purchased, but not merely for the purpose of mixing with the produce of the testator's mines for improving the iron. C, at the end of two years, purchased B's share, and the business was carried on in the same manner by C and H, till H died. There was no written or other agreement for the duration of the partnership.

Held, that this was not a mere joint interest in the produce of land, but a trading partnership: that it was dissolved by the death

TRADING.

of H, and that the fact of C and H having purchased and taken assignments to a trustee for themselves, of some of the rents reserved by the leases, did not furnish any inference of an agreement to continue the partnership for any definite period; and a sale of the property was ordered on motion.

Semble, that this was a trading within the meaning of the bankrupt laws. *Crawshay v. Maule*, 1 *Wils.* 181.

5. In order to constitute a party a trader within the meaning of the bankrupt laws, it is sufficient that he acknowledge himself to have been in partnership with one who was a trader, and is proved to have given directions in the concern, though no act of buying or selling during the time of the partnership can be established in evidence. *Parker v. Barker*, 1 *Taunt.* and *Brod.* 9.

6. A person who buys any article for the purpose of mixing it with his own produce, with a view to sell the mixture more advantageously than his own mixture could be sold unmixed, does not thereby become a trader. *Patton v. Browne*, 7 *Taunt.* 409.

7. A person who buys pigs or other stock with a view to a resale of them, as ancillary to the profitable occupation of his farm, and in the interval feeds them wholly or principally on the produce of his farm, does not thereby become a trader. *S. C.*

8. A farmer bought rye grass-seed, mixed it with seed of his own growth, and sold the mix-

ture. He bought pigs, put them on his farm, fed them on the stubbles, and re-sold them, some after a week, some after longer periods. Held, that neither of these was act of trading. *S. C.*

9. If a bankrupt be described in a commission as a dealer in cattle only, evidence cannot be adduced to prove that he was a dealer in hops. *Quære*.—Whether a farmer, who deals largely in sheep, and sells some at fairs from his own farm, and makes purchases and sells at the same fair, at a profit and loss; and buys and sells others that had never been at any fair, be a trader within the 5 *Geo. II. c. 30, s. 40?* *Hale v. Small*, 3 *Moore* 58.

10. A servant of the proprietor of a newspaper, subject to a dismissal at pleasure, who daily directs the number of copies to be printed, purchases the whole impression, retails them, and is paid for his services by getting 1s. 6d. per quire on all that he sells, sustaining the loss which occurs by those copies which remain unsold, is a trader within the bankrupt laws. *Gittingham v. Laing*, 6 *Taunt.* 532.

11. An acknowledgment by a person, that he was in partnership with another as a trader, who afterwards became bankrupt, is sufficient to constitute a trading within the meaning of the bankrupt laws; although no acts of buying and selling were proved to have taken place during the partnership. *Parker v. Barker*, 3 *Moore* 226.

TRIAL AT LAW.

TRANSFER OF POSSESSION,

1. Whether an endorsement of the delivery checks or warrants of the West India Docks will pass the property in the goods therein mentioned?

After a contract for the sale of goods, and a written order on the wharfinger for delivery, communicated to the wharfinger, and assented to by him, though no actual transfer be made in his books, the property passes to the vendee. *Lucas v. Dorrien*, 7 *Taunt.* 278.

2. A banker has no lien on muniments casually left in his shop after he has refused to advance money on them as security. *S. C.*

3. Where A having occasion to borrow money of B, leaves with him as a collateral security, warrants of the West India Dock Company for sugars, deposited in their warehouses, and entered in his name in their books and afterwards becomes bankrupt:—Held, that A had not such a possession of the sugars as would enable his assignees to maintain trover for them, as the transfer of the warrants was a complete transfer of the possession before the bankruptcy, so as to take the case out of the statute 21 *Jac.* 1. c. 19. s. 11. *Lucas v. Dorrien*, 1 *Moore* 29.

TRESPASS.

See *Action*.

TRIAL AT LAW.

See *Petition*, 15.

USURY.

TROVER.

See *Action*.

TRUSTEE.

See *Proof*, 9.

Pleading, 4.

Certificate, 23.

TRUST DEED.

1. Order for production, before commissioners of bankruptcy, of a deed of trust, alleged to be an act of bankruptcy; but if the petitioning creditor knew of, and acquiesced under it, though he did not execute, it will not support the commission. *Ex parte Caikwell*, 19 *Ves.* 233.

USURY.

1. Whether a commission of one half per cent. upon a banking account be usurious or not, is a question for the jury, depending upon whether it may be ascribed to a reasonable remuneration for trouble and expense, or whether it be a colour for the payment of interest above £5 per cent. upon a loan of money, and if there be a contrariety of evidence upon that point, the court will not set aside the verdict and grant a new trial, although the verdict be against the opinion and direction of the judge who tried it; unless it appears clearly that the jury have drawn an erroneous conclusion. *Carstairs* and others, assignees of *Kensington* and others, v. *Stein*, and others. 4 *Maul.* and *Sel.* 192.

VOLUNTARY BOND.

UNCLAIMED DIVIDENDS.

See *Dividend*, 4.

UNDERWRITER.

See *Insurance*.

VENDOR AND VENDEE.

See *Specific Performance*, 1.
Order and Disposition, 3.
Lien, 2.

VENUE.

See *Action*, 15.

VERDICT.

See *Evidence*, 17.

VICE CHANCELLOR.

See *Appeal*, 1.
Procedendo, 1.

1. The Vice Chancellor can certify the propriety of awarding the writ of procedendo, in cases where a commission has been superseded upon his certificate. *Ex parte Crump re Bell*, 1 *Buck C. B.* 3.

VOLUNTARY BOND.

1. Voluntary bond, though void against creditors, being valid as between the parties, its surrender is a consideration that will sustain a substituted bond against creditors, unless with a fraudulent design; as by an insolvent to substitute a valid for an invalid security against creditors. *Ex parte Berry*, 19 *Ves.* 218.

WITNESS.

VOLUNTARY CONVEYANCE.

1. A father, at the request of his son, executes a mortgage to secure a debt due from the son to the mortgagee. Held, that the mortgage is not a voluntary conveyance without consideration within 1 *Jac. I. c. 15, s. 5*. *Ex parte Hearn re Hamlyn*, 1 *Buck C. B.* 165.

2. A tenant for life, with remainder to his children, redeems the land tax on the estate with his own money, introducing into the contract for the redemption his own name and that of another, as trustees for his children, and afterwards becomes bankrupt. On bill by his assignees against a purchaser of his life estate, and of the land tax so redeemed, a specific performance decreed, as being within the statute 1 *Jac. I. c. 15, s. 5*. *Emly and others v. Guy*, 3 *Mer.* 702.

WAIVER.

See *Partners*, 13.

WEST INDIA DOCK WARRANTS.

See *Transfer of Possession*, 1.

WITNESS.

See *Issue*, 2, 3.

Evidence, 11, 13, 17.

Practice, 7, 8.

1. A person having a deed in his possession that in effect amounted to an act of bankruptcy by one of the parties, was ordered to attend the commission-

WITNESS.

ers with it, without prejudice to any objection being taken before them, as to disclosure of confidential communications. Ex parte *Treacher* re —, 1 *Buck* C. B. 17.

2. Witness who had been before summoned, ordered to attend the commissioners to be examined touching the act of bankruptcy. Ex parte *Bowler* re *Wetherell*, 1 *Buck* C. B. 258.

3. If a solicitor, not being the

bankrupt's solicitor, has in his custody a deed of assignment executed by the bankrupt, he must produce it, if required so to do by the commissioners. Ex parte *Law* re *Oakden*, 1 *Buck* C. B. 110.

4. Commissioners of bankruptcy considered a court of justice for the purpose of protecting witnesses before them. Ex parte *Russell*, 19 *Ves.* 165.

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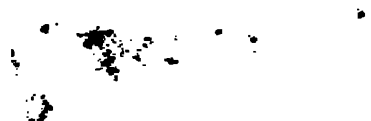
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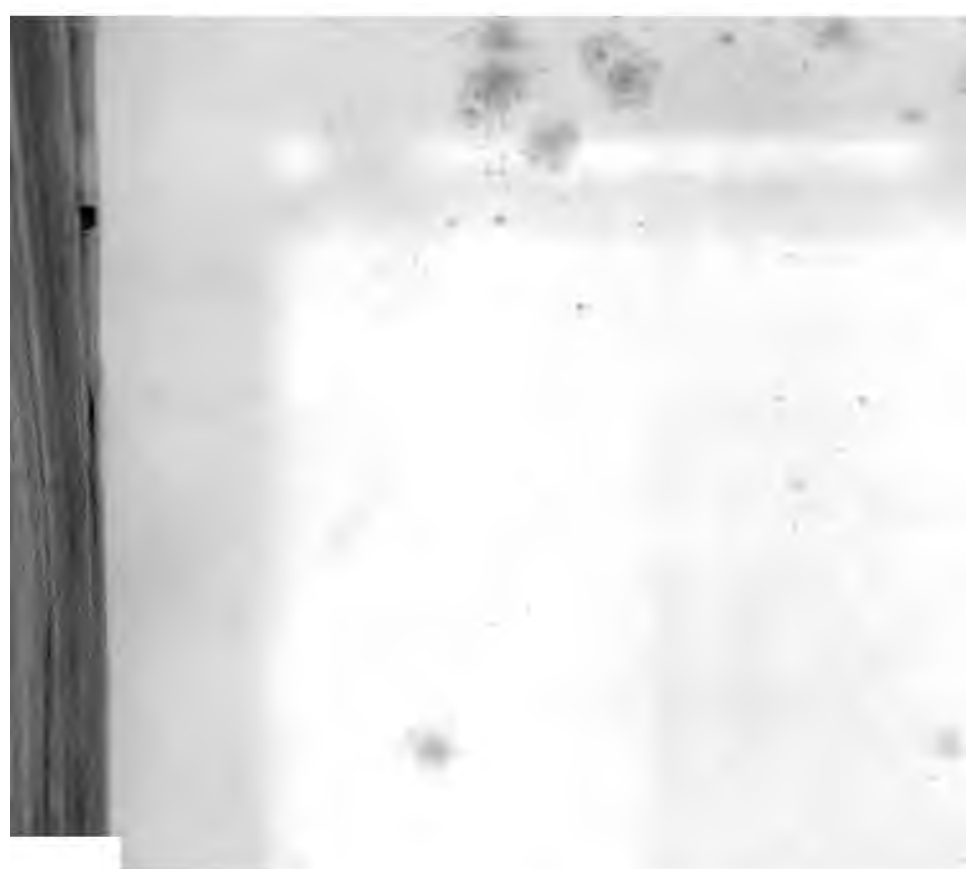
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